

March 22, 2018 P.M.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re: Bard IVC Filters,)
Products Liability Litigation)
)
) MD-15-02641-PHX-DGC
)
Sherr-Una Booker, an individual,)
) Phoenix, Arizona
Plaintiff,) March 22, 2018
v.) 1:00 p.m.
)
C.R. Bard, Inc., a New Jersey)
corporation; and Bard Peripheral) CV-16-00474-PHX-DGC
Vascular, Inc., an Arizona)
corporation,)
)
Defendants.)
)

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 6 P.M.

(Pages 1210 through 1322)

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United States District Court

March 22, 2018 P.M.

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1940 Schulz Deposition, 01/30/2014 - Exhibit 11 - Chart of Adverse Events and Deaths for all competitors from Prior	1269	1270

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1944 Schulz Deposition, 01/30/2014 - Exhibit 15 - 5/19/2006 E-mail from Natalie Wong to Gin Schulz and Candi Long, attaching the PowerPoint	1269	1270
1945	1269	1270
1946 Schulz Deposition, 01/30/2014 - Exhibit 17 - 2/2/2006 E-mail from Gin Schulz to Several Re. "Minutes"	1269	1270
1948 Schulz Deposition, 01/30/2014 - Exhibit 2 - 1/31/2006 E-mail from Gin Schulz to Micky Graves and Natalie Wong Re.	1269	1270
1949 Schulz Deposition, 01/30/2014 - Exhibit 21 - 6/28/2011 Email Chain from Brian Hudson to Kevin Bovee and Chad Modra Re Talking Points	1269	1270
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SHERR-UNA BOOKER - Direct

P R O C E E D I N G S

01:00:29

(Jury enters at 1:00.)

(Court was called to order by the courtroom deputy.)

(Proceedings begin at 1:01.)

THE COURT: Thank you. Please be seated.

01:02:20

MR. O'CONNOR: Your Honor, before we get started, we have a stipulation on some exhibits and we agreed that I could offer them into evidence at this time.

THE COURT: All right.

MR. O'CONNOR: They will be 1327 --

01:02:35

THE COURT: Well, hold on just one minute. Are these needed for the cross-examination?

MR. O'CONNOR: They may be needed on redirect. They are medical records.

THE COURT: Let's have you do it at the start of redirect.

01:02:48

MR. O'CONNOR: Okay. Thank you.

THE COURT: All right. You may proceed, Ms. Helm.

MS. HELM: Thank you, Your Honor.

(SHERR-UNA BOOKER, a witness herein, was previously duly sworn or affirmed.)

01:02:56

CROSS EXAMINATION (Continued)

BY MS. HELM:

Q. Ms. Booker, before we took the lunch break, we were talking about your treatment at Lincoln Medical in March of

01:03:00

United States District Court

SHERR-UNA BOOKER - Direct

1 2009.

01:03:03

2 MS. HELM: And, Kyle, would you pull up 6667?

3 BY MS. HELM:

4 Q. And I have to remember that because you and I can see it,
5 it doesn't mean the jury can see it.

01:03:15

6 MS. HELM: Your Honor, may I publish 6667?

7 THE COURT: You may.

8 BY MS. HELM:

9 Q. Just to catch the jury up, this is your admission record
10 at Lincoln Medical on March 26, 2009; is that right?

01:03:28

11 A. Yes.

12 MS. HELM: And Kyle, would you pull up 6668?

13 BY MS. HELM:

14 Q. And again, Ms. Booker, this is the x-ray report we were
15 talking about from March 26, 2009, at Lincoln Medical; correct?

01:03:46

16 A. Yes.

17 MS. HELM: May I publish it, Your Honor?

18 THE COURT: Yes.

19 BY MS. HELM:

20 Q. And this is an x-ray of your lumbosacral or your back;
21 correct?

01:03:57

22 A. Yes.

23 Q. And it says there's no evidence of fracture or dislocation
24 in your vertebrae; correct?

25 A. Correct.

01:04:09

United States District Court

SHERR-UNA BOOKER - Direct

1 Q. And then it says IVC filter is noted; correct?

01:04:09

2 A. Yes.

3 Q. Thank you.

4 Ms. Booker, after you had the filter implanted in
5 2007 and after you stopped taking Coumadin sometime before
6 March of 2009, you have not suffered from a pulmonary embolism,
7 have you?

01:04:24

8 A. No.

9 Q. You have been concerned a few times and gone to seek
10 medical treatment, haven't you?

01:04:36

11 A. Well, I went because I was having chest pains.

12 Q. All right. But you've never been diagnosed as suffering
13 from a pulmonary embolism; correct?

14 A. Correct.

15 Q. You moved to Georgia sometime in 2010; is that right?

01:04:48

16 A. Yes.

17 Q. And once you moved to Georgia, you started seeking medical
18 care in Georgia; is that correct?

19 A. Yes.

20 Q. And for the ladies and gentlemen of the jury who may not
21 have had the benefit of living in the southeast, your body has
22 to get used to the pollen, doesn't it?

01:04:59

23 A. Yes.

24 Q. And you've had some issues with sinus infections and as a
25 result, with migraine headaches; correct?

01:05:13

United States District Court

SHERR-UNA BOOKER - Direct

1 A. Yes.

01:05:15

2 Q. And you have been under the care of a variety of doctors;
3 correct?

4 A. Yes.

5 Q. In fact, in July of 2011 you went to the emergency room at
6 Gwinnett Medical Center and that was the first time you had
7 been there; is that correct?

01:05:25

8 A. I'm not sure unless you show me the document.

9 Q. I'll be happy to.

10 MS. HELM: 6681, please.

01:05:36

11 BY MS. HELM:

12 Q. Do you see this is a medical record for you from Gwinnett
13 Medical Center?

14 A. Yes.

15 MS. HELM: Your Honor, may I publish?

01:05:47

16 THE COURT: Yes.

17 MS. HELM: And if you'll go to the next page, Kyle.

18 BY MS. HELM:

19 Q. You went to Gwinnett Medical Center on July 21, 2011, and
20 told them you had left leg pain; is that correct?

01:06:03

21 A. Yes, ma'am.

22 Q. You also told them that you a medical history of cervical
23 cancer, mitral valve prolapse, MI, or heart attack, times two,
24 pulmonary embolism and blood clots; is that right?

25 A. Yes. At that time, that was my belief and I told you

01:06:19

United States District Court

SHERR-UNA BOOKER - Direct

1 earlier that Dr. Patel told me that it was not a heart attack
2 either time.

01:06:22

3 Q. You also told them you had a past surgical history of an
4 appendectomy?

5 A. Yes.

01:06:31

6 Q. Foot surgery and hernia repair; is that right?

7 A. Yes.

8 Q. Did you ask them to check on your filter?

9 A. I don't remember.

10 Q. Okay. Thank you.

01:06:43

11 You next went to the emergency room on November 11,
12 2011, for chest pain; is that right?

13 A. Can you show it to me, please.

14 Q. Sure.

15 MS. HELM: 6383. May I publish, Your Honor? It's
16 been admitted.

01:06:59

17 THE COURT: Yes.

18 BY MS. HELM:

19 Q. So you went to the emergency room complaining of headache
20 and chest pain; is that right?

01:07:14

21 A. Yes.

22 Q. And they took an x-ray; is that right?

23 A. Yes.

24 Q. Did you ask them to check on your filter?

25 MR. O'CONNOR: Objection, irrelevant.

01:07:23

United States District Court

SHERR-UNA BOOKER - Direct

1 THE COURT: Overruled.

01:07:24

2 THE WITNESS: I don't remember if I did. Maybe it's
3 in the notes but I don't remember. There were times I would
4 ask and there were times that I didn't.

5 BY MS. HELM:

01:07:34

6 Q. But until July or June or July of 2014, no one told you
7 that there was any issue with your filter; is that correct?

8 A. Not that I can remember, no.

9 Q. That's something you would remember, isn't it?

10 A. I believe so.

01:07:50

11 Q. Now, Ms. Booker, you testified earlier that Dr. Patel is
12 your cardiologist.

13 A. Yes, he is.

14 Q. And we heard from Dr. Patel this week. You actually first
15 went to see Dr. Patel in approximately 2012 for a possible
16 hernia repair. Do you recall that?

01:08:01

17 A. I think so. I believe so. It was around that time. I'm
18 not sure.

19 Q. So as of approximately 2012, you at least had Dr. Patel as
20 your cardiologist if you needed him; correct?

01:08:19

21 A. Yes, I believe so.

22 Q. I want to talk about one more hospital admission before we
23 talk about the filter and the events after the filter.

24 MS. HELM: Kyle, if you would pull up 6693.

25 \\

SHERR-UNA BOOKER - Direct

1 BY MS. HELM:

01:08:38

2 Q. This is an admission where you actually went to a
3 different hospital called Emory Eastside; is that right?

4 A. Yes, ma'am.

5 Q. And you went on April 9, 2013?

01:08:45

6 A. Yes.

7 Q. And you were complaining of abdominal pain; is that right?

8 A. Yes.

9 MS. HELM: Kyle, would you skip to page five, please.

10 BY MS. HELM:

01:08:54

11 Q. And they took a CT scan of your abdomen? Do you see that?
12 The CT?

13 A. Yes, I do see that.

14 Q. Did anyone ever tell you what that CT scan showed?

15 A. Not that I can recall.

01:09:06

16 Q. Did you ask them to check on your filter?

17 A. I don't remember. Like I said, there were times I did ask
18 and there were sometimes I didn't. But if it's not in the
19 notes, then I can't be sure.

20 Q. Ms. Booker, I want to ask you a few questions about your
21 interaction with Dr. Kang and the procedures in 2014.

01:09:26

22 A. Yes.

23 Q. You heard Dr. Kang testify this week that during the
24 procedure to attempt to remove the strut from your heart, he
25 tore your tricuspid valve; is that right?

01:09:43

United States District Court

SHERR-UNA BOOKER - Direct

1 A. I believe that's what I heard, yes.

01:09:46

2 Q. But the first time anyone told you that Dr. Kang tore your
3 tricuspid valve was in February of 2017 when I told you; isn't
4 that right?

5 A. I don't remember. I really don't remember. During the
6 surgery that Dr. Kang did, I was groggy and all I remember them
7 telling me honestly is that I still needed the open heart
8 surgery. Everything else, it sounded like -- like Charlie
9 Brown in my year, you know, the wonk, wonk, wonk thing. That's
10 all I remember hearing.

01:10:00

01:10:22

11 Q. Ms. Booker, it was your February -- in February of 2017
12 that it was your understanding that the fractured strut had
13 torn your tricuspid valve, wasn't it?

14 A. I think that's what I did understand.

15 Q. And, in fact, when I told you that Dr. Kang had admitted
16 that he tore your tricuspid valve, you responded that that was
17 the first time you had heard that; correct?

01:10:39

18 A. I think that's what I might have said.

19 Q. So after Dr. Kang performed the procedure, he did not come
20 in and tell you that the complication was because he had torn
21 the tricuspid valve; is that right?

01:10:56

22 A. I remember him telling me that there were complications.
23 What he told me the complications were, I don't remember. I
24 was just upset so I don't remember.

25 Q. When you were discharged by Dr. Harvey, did he tell you

01:11:14

United States District Court

SHERR-UNA BOOKER - Direct

1 that you have pacemaker wires implanted?

01:11:18

2 A. I don't remember.

3 Q. Do you understand today that you have pacemaker wires
4 still inside you?

5 A. Yes. Dr. Patel made sure that I understood what that
6 meant.

01:11:29

7 Q. Have you asked anyone to check on those pacemaker wires?

8 A. I'm not sure. I know they can see them when I go to my
9 appointments and I know that they are not in my heart. I know
10 that they are in my chest which is a lot different from that
11 piece that was in my heart.

01:11:49

12 Q. When Dr. Harvey discharged you approximately September or
13 October of 2014, he told you to follow up with your
14 cardiologist, Dr. Patel, didn't he?

15 A. I'm sorry? Can you were repeat that?

01:12:06

16 Q. Sure. When Dr. Harvey discharged you in September or
17 October of 2014, he told you to follow up with your
18 cardiologist, Dr. Patel; correct?

19 A. I believe so.

20 Q. But you didn't do that, did you?

01:12:24

21 MR. O'CONNOR: Objection, irrelevant. There is no
22 claim under that, Your Honor.

23 THE COURT: Sustained.

24 BY MS. HELM:

25 Q. Ms. Booker, how long was it before you went to see

01:12:33

United States District Court

SHERR-UNA BOOKER - Direct

1 Dr. Patel after you were discharged in September of 2014 by
2 Dr. Harvey?

01:12:35

3 A. I don't remember but I do remember seeing some of his
4 partners. I remember going and seeing some of his partners and
5 they reported back to him.

01:12:47

6 Q. You went to the emergency room on November 5, 2014,
7 complaining of chest pain, didn't you?

8 A. I'm sorry. I don't know unless you show me.

9 MS. HELM: 2378.

10 BY MS. HELM:

01:13:07

11 Q. Is this a medical record from Gwinnett Medical Center?

12 MS. HELM: Your Honor, may I publish this? It has
13 been admitted.

14 THE COURT: Yes.

15 BY MS. HELM:

01:13:16

16 Q. Dated 11-5-4; is that right?

17 A. Yes.

18 Q. And you presented to the emergency room complaining of
19 chest discomfort and a sensation of difficulty breathing; is
20 that right?

01:13:24

21 A. Yes, ma'am.

22 Q. The doctors in the emergency room discussed you with
23 Dr. Heller, a cardiologist, and they recommended that you be
24 admitted to the Emergency Department for a stress test. Do you
25 see that?

01:13:42

United States District Court

SHERR-UNA BOOKER - Direct

1 A. Yes, I do.

01:13:43

2 Q. And they discussed that with you and you refused to be
3 admitted.

4 MR. O'CONNOR: Objection. Irrelevant. There's no
5 claim on that.

01:13:50

6 THE COURT: Overruled.

7 BY MS. HELM:

8 Q. Ms. Booker, you refused to be admitted, didn't you?

9 A. It does state that, yes, I did.

10 Q. And it also says that after discussing the risks of
11 leaving for evaluation is complete, the patient continued to
12 refuse to stay and request to sign out against medical advice.
13 They decided that that was the next best thing and would
14 contact cardiology to follow up with you; is that right?

01:13:59

15 A. I'm sorry. You're only reading a portion of it. If you
16 could just please give me the opportunity to read the whole
17 thing so I can decide what it was that I felt or did on that
18 day. Thank you.

01:14:19

19 Okay. I've read it. I'm sorry. Can you repeat your
20 question?

01:15:28

21 BY MS. HELM:

22 Q. The doctors in the Emergency Department at Gwinnett
23 Medical wanted to admit you. You refused and signed out
24 against medical advice; correct?

25 MR. O'CONNOR: Objection, Your Honor. May we have a

01:15:37

United States District Court

SHERR-UNA BOOKER - Direct

1 sidebar, please.

01:15:44

2 THE COURT: No. This is in evidence. She can ask
3 about a document in evidence so the objection is overruled.

4 MR. O'CONNOR: But I believe this issue is subject to
5 an agreement or that we --

01:15:52

6 THE COURT: This document is in evidence so she can
7 ask about a document in evidence and it came in with your
8 agreement. If there's another issue that comes up, I'll be
9 happy to consider it.

10 MR. O'CONNOR: All right. Thank you.

01:16:04

11 BY MS. HELM:

12 Q. Ms. Booker, did you follow up with Dr. Heller or Dr. Patel
13 after you left Gwinnett Medical Center on November 5, 2014,
14 against medical advice?

15 A. Did I follow up against medical advice?

01:16:20

16 Q. Ma'am, did you follow up with Dr. Heller or Dr. Patel,
17 your cardiologist, after November 5, 2014, after you refused to
18 be admitted to Emergency Department?

19 A. I don't remember. I can't recall. I know at some point I
20 went back to the doctor after that but when it was, I don't
21 remember.

01:16:38

22 Q. Thank you.

23 MS. HELM: Kyle, would you pull up 2312, please.

24 BY MS. HELM:

25 Q. Ms. Booker, these are records from Gwinnett Cardiology,

01:16:51

United States District Court

SHERR-UNA BOOKER - Direct

1 Dr. Heller and Dr. Patel, and you see that those relate to you? 01:16:55

2 A. Yes, but before you ask me a question, do you mind if I
3 read the whole thing?

4 Q. You can take your time.

5 A. Thank you. 01:17:05

6 MS. HELM: Your Honor, may this be published while
7 she's reading? It's been admitted.

8 THE COURT: Yes.

9 BY MS. HELM:

10 Q. Ms. Booker, maybe I can help you. This document is small 01:17:44
11 but I'm going to pull up a portion of it.

12 MS. HELM: Would you pull up page one?

13 THE WITNESS: The things with portions of it, it
14 leaves off certain things and I want to be able to read the
15 whole thing. I've learned from this trial that you need to 01:17:55
16 make sure you see everything.

17 MS. HELM: Thank you. Page one of 2312, the blow-up.

18 BY MS. HELM:

19 Q. Ms. Booker, you see that on November 5, the day after you
20 left Gwinnett Medical Center against medical advice, 01:18:19
21 Dr. Patel's office called you to schedule a follow-up
22 appointment but they were unable to contact you.

23 A. Yes, I see that part.

24 MS. HELM: Would you pull up page two, please.

25 \\

SHERR-UNA BOOKER - Direct

1 BY MS. HELM:

01:18:34

2 Q. They actually had received an email from someone to call
3 you and schedule an appointment but your voicemail was full and
4 they are unable to leave a message; correct?

5 A. That's what it says, yes, ma'am.

01:18:47

6 Q. And, in fact, because they had not been able to get in
7 touch with you on November 21, 2014, they recorded that they
8 mailed you a letter requesting you to contact them.

9 A. Oh, that date brings back my memory. Thank you. I was
10 actually in New York caring for my ill father that was dying
11 from cancer. That is probably why they couldn't reach me.

01:19:08

12 Q. But you --

13 A. And as a matter of fact, in New York I did go to the
14 emergency room, so thank you for reminding me. That was my
15 father's last Thanksgiving.

01:19:24

16 Q. Now, Ms. Booker, in September of 2015 you went to the
17 emergency room at Piedmont Hospital; correct?

18 A. I'm sorry, when.

19 MS. HELM: 6741. Your Honor, may I publish? It's
20 been admitted.

01:19:48

21 THE COURT: What's the number?

22 MS. HELM: 6741.

23 THE COURT: Yes, you may.

24 BY MS. HELM:

25 Q. Ms. Booker, this is an admission for you at Piedmont

01:19:53

United States District Court

SHERR-UNA BOOKER - Direct

1 Hospital on September 30, 2015; is that right?

01:19:56

2 A. Yes, but there was a visit to the hospital prior to that
3 one so did you bring that one up.

4 Q. No, ma'am. I'm going to ask you about this one. Okay?

5 MS. HELM: And would you go to the discharge summary
6 which is 6745, please.

01:20:10

7 Your Honor, may this be published? It's been
8 admitted.

9 THE COURT: Yes.

10 MS. HELM: And would you go to the last page?

01:20:39

11 BY MS. HELM:

12 Q. Ms. Booker, this is the discharge summary from Piedmont
13 Hospital and you see where it says to follow up with your
14 primary care provider in one week and to follow up with
15 Dr. Sigman. Do you see that?

01:20:57

16 A. Yes. Yes, I see that.

17 Q. Do you know who Dr. Sigman is?

18 A. I don't remember him.

19 Q. Dr. Sigman is a cardiologist. Did you follow up with him?

20 A. I don't remember.

01:21:09

21 Q. Did you follow up with Dr. Patel after this admission on
22 September 30, 2015?

23 A. I don't remember.

24 Q. Well, if Dr. Patel's records show that you did not come
25 back and see him until August 8, 2016, you have no reason to

01:21:24

United States District Court

SHERR-UNA BOOKER - Direct

1 dispute that, do you?

01:21:27

2 A. I have no -- no, if it doesn't show, but I'm sure I've
3 seen other doctors in between then that were affiliated with
4 him.

5 Q. And who did you see in between that was affiliated with
6 him?

01:21:38

7 A. I'm not sure. I'm sure you have all of my records.

8 Q. Right. And if the records show that the next visit to
9 Dr. Patel or his partners or anyone at Gwinnett Cardiology was
10 August 8, 2016, you don't dispute that, do you?

01:21:52

11 A. If that's what it shows, no, I can't.

12 Q. In fact, the very first time that you went to see
13 Dr. Patel after being discharged by Dr. Harvey in 2014 was
14 August 8, 2016, wasn't it?

15 A. Like I had said previously, I did see other doctors. I
16 did seek treatment at other hospitals. One, because I was,
17 one, caring for my sick father in another state. Two, it might
18 have been wherever I was at the time I didn't feel good and I
19 did see other doctors and I -- to my understanding, those were
20 reported and they -- my doctor was called on that.

01:22:18

01:22:39

21 Q. But the first time you went to physically see your
22 cardiologist after being discharged by Dr. Harvey was August 8,
23 2016; correct?

24 A. If that's what it shows, yes, ma'am.

25 Q. Two years after you were discharged; correct?

01:22:55

United States District Court

SHERR-UNA BOOKER - Direct

1 A. That was like a year and a half.

01:23:02

2 Q. And, in fact, you made and canceled appointments with
3 Dr. Harvey over that two-year period and subsequent to that,
4 didn't you?

5 A. I made and canceled with Dr. Harvey?

01:23:12

6 Q. With the cardiologist group.

7 A. I'm not quite sure. I think one time I went to them and
8 they told me I no longer needed to come back to them. I don't
9 know when that was but they told me because they were card --
10 heart surgeons, that I didn't need to see them any more and to
11 go to see a regular cardiologist.

01:23:34

12 Q. And that's Dr. Patel, your regular cardiologist?

13 A. Yes, ma'am.

14 Q. Okay. That's the doctor that you didn't go see for two
15 years after Dr. Harvey told you to follow up with him; correct?

01:23:49

16 A. That is the doctor that my other doctors reported to and
17 then I did see him about a year and a half later.

18 Q. Actually, August 8 of 2016; correct?

19 A. If that's what it shows, yes, ma'am.

20 MS. HELM: Would you pull up 6751, please.

01:24:07

21 Your Honor, may I publish? It's been admitted.

22 THE COURT: Yes.

23 BY MS. HELM:

24 Q. This is your -- this is a medical record showing that you
25 went to see Dr. Patel on August 8, 2016; is that right?

01:24:18

United States District Court

SHERR-UNA BOOKER - Direct

1 A. Yes, ma'am.

01:24:23

2 Q. And Dr. Patel on this visit prescribed you some
3 medication, didn't he?

4 A. Yes, ma'am.

5 Q. And, in fact, you quit taking the medication on your own,
6 didn't you?

01:24:33

7 MR. O'CONNOR: Objection. Irrelevant. This is not
8 an issue.

9 THE COURT: Well, you've objected to that several
10 times. Let's talk about it, Mr. O'Connor.

01:24:43

11 Go ahead and stand up if you need, to ladies and
12 gentlemen.

13 (At sidebar 1:25.)

14 THE COURT: I'm not understanding the relevancy
15 objection, Mr. O'Connor.

01:25:02

16 MR. O'CONNOR: Because they have withdrawn any claim
17 of mitigation of damages, number one. Number two, she's
18 talking about issues that are completely unrelated to this
19 filter. Three, there was a stipulation she knows real well
20 about where they asked us to agree that we would not bring in
21 the fact that the reason Ms. Booker didn't go see these doctors
22 is because she couldn't afford them.

01:25:16

23 Now, it's one thing to let a record in. It's another
24 thing to draw the jury's attention to it and make a big deal of
25 the fact that she's doing something that somehow she's

01:25:32

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1 negligent or she's not mitigating her damages.

01:25:35

2 But now they have put us in a position where I have
3 to ask her to explain why she had to leave the emergency room,
4 why she didn't go back to doctors, and it was because she
5 couldn't afford it. She worked in jobs where she didn't have
6 insurance or she was recovering from this and she didn't have
7 the funds.

01:25:48

8 THE COURT: What's your thought, Ms. Helm?

9 MS. HELM: First of all, Your Honor, she has
10 testified that she worries about her filter. She's worried
11 about it. She follows up. This testimony clearly goes to her
12 credibility and to her damages. This treatment in August of
13 2016, she was actually employed and had insurance at the time.

01:26:01

14 And the collateral source rule, we're not putting in
15 the fact that she didn't pay her bills or that her bills were
16 written off because she didn't pay them because we can't, under
17 Georgia law, and under also Georgia law, the worldly
18 circumstances of the parties, the ability to pay is not
19 admissible. They are able to chalkboard 271,000 in expenses
20 that she never incurred. She didn't pay them.

01:26:21

01:26:37

21 THE COURT: Well, but that's the law. There's
22 nothing about that.

23 MS. HELM: But the law also is that she can't testify
24 that she can't afford medical care. There's no evidence at
25 this time that she couldn't afford medical care. It goes to

01:26:49

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1 her damages. "I was worried. I was worried." She didn't
2 follow up with her doctor.

01:26:52

3 THE COURT: Well, let me tell you why I thought this
4 was all relevant, because you are making a pain and
5 suffering --

01:27:00

6 MS. HELM: Exactly.

7 THE COURT: Hold on. A pain and suffering damages
8 claim for this whole period.

9 Hold on.

10 All of these records seem to suggest there were
11 potential other causes, other doctor visits for the pain and
12 suffering. That seems to me to be fair game if you're seeking
13 pain and suffering for the entire period.

01:27:07

14 MR. O'CONNOR: Maybe that's forgiven but they are
15 taking it a step further. I didn't ask her, and she didn't
16 testify, that she continues to follow up with doctors about the
17 filter. That's evidence that came in that, number one -- and
18 that's a different issue. But these are different, unrelated
19 conditions she's been going to doctors about.

01:27:21

20 THE COURT: That's entirely --

01:27:34

21 MR. O'CONNOR: She's trying to show she's got bad
22 character of not following up with doctors and we know that you
23 can't do that.

24 THE COURT: Well, you just said other conditions she
25 went to see doctors about. That stuff is entirely fair if you

01:27:43

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1 are asking the jury to compensate her for all of the pain and
2 suffering during this period.

01:27:46

3 MR. O'CONNOR: Sure. But to take it a step further,
4 to take it a step further and now make that an issue where
5 somehow this patient is not mitigating her damages or she's an
6 irresponsible patient on an unrelated condition. It's one
7 thing to say, "Okay. You've got a myriad of problems," and
8 argue to the jury that they want to do that. But she's trying
9 to all make it this when she has all of those other problems.
10 That may be fair.

01:27:56

01:28:11

11 But to take it a step further and to use that reason
12 to get this evidence in to do something as prejudicial as they
13 are doing, something that is clearly against the stipulations,
14 and they are walking close but they haven't opened them
15 already, about her inability to pay and the fact that they
16 agreed they weren't going to bring in mitigation of damages.

01:28:28

17 But when she goes in for something completely
18 unrelated to this filter and the question is, "You didn't
19 follow up with your doctor about that," that's different than
20 saying, "You were in pain on this day and you went to the
21 doctor for back pain or a chest pain that was not related to
22 your filter."

01:28:42

23 If that was clear that's what they were drawing the
24 jury's attention to, I wouldn't be up here. But they are using
25 this in a way that is clearly intended to prejudice our case.

01:28:53

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1 THE COURT: Okay. I understand your point. 01:28:57

2 Hold on. Hold on. Let me see the stipulation.

3 MS. LOURIE: And they did involve mitigation.

4 THE COURT: Which one? So what's the stipulation?

5 MS. LOURIE: The stipulation says that we -- well, 01:29:14

6 this is how you ruled on our motion *in limine* that we couldn't
7 talk about insurance and that's the main reason she didn't go
8 to a lot of these appointments. She didn't have the funds.

9 THE COURT: Okay. I understand your point.

10 MS. HELM: The admission which she left AMA is on 01:29:26
11 their chart of medical damages. They are seeking damages,
12 medical expenses, for this treatment, this admission to the
13 hospital. They claim this is part of her injury and damages
14 because they have put the medical --

15 THE COURT: What is AMA? 01:29:44

16 MS. HELM: Against medical advice. The admission we
17 just were talking about at Gwinnett Medical Center when she
18 left, they say that was follow-up because of her heart pain
19 from the surgery. So the circumstances of that admission are
20 clear. 01:30:01

21 MS. LOURIE: Then we should be allowed to ask her
22 about them.

23 THE COURT: Hold on a minute. So why is it relevant
24 that it was against medical advice? I'm not understanding
25 that. 01:30:12

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1 MS. HELM: Well, Your Honor, the context of that
2 treatment that they are seeking damages, they are saying she
3 went in that day, goes to her pain and suffering claim. She
4 went in that day because of damages from the heart surgery but
5 she refused treatment on that day. That's clearly relevant to
6 her pain and suffering claim and she could have gotten
7 treatment and mitigated her issues and her concerns.

01:30:13

8 THE COURT: That's a failure to mitigate argument and
9 you've withdrawn a failure to mitigate argument.

01:30:27

10 MS. HELM: But it goes to her pain and suffering. It
11 clearly goes to her pain and suffering.

01:30:40

12 THE COURT: What is your response to plaintiff's
13 counsel suggestion that they should be allowed to have her now
14 testify that the reason she didn't follow up in many of these
15 instances was because she couldn't afford it?

01:30:56

16 MS. HELM: First of all, there's no evidence.

17 THE COURT: Hold on. You better hear this.

18 MS. HELM: Your Honor, there's no evidence that
19 that's why she wasn't following up.

20 THE COURT: Well, but if she testifies to that, there
21 will be.

01:31:05

22 MS. HELM: Then I think that they have opened the
23 door. It violates the collateral source rule. And they have
24 opened the door because then we can put in evidence that all of
25 these medical records were written off.

01:31:16

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SHERR-UNA BOOKER - Direct

1 THE COURT: But if you've intentionally brought out 01:31:18
2 the fact that she didn't go back, haven't you opened the door
3 for an explanation as to why?

4 MS. HELM: No, Your Honor. I think it clearly goes
5 to her pain and suffering claim. She's testified that she was 01:31:26
6 worried about the filter and she was -- she followed up. This
7 clearly goes to show that she wasn't following up. She was
8 going to the emergency room. She was not following up with her
9 cardiologist which she admitted she was told to do.

10 MR. O'CONNOR: I don't recall her saying anything 01:31:51
11 about her following up with her doctors because she's worried
12 about that filter that's embedded in her. I really --

13 THE COURT: Well, she did testify clearly --

14 MR. O'CONNOR: That she was worried about it.

15 THE COURT: She thinks about it every day was her 01:32:05
16 testimony.

17 MR. O'CONNOR: That's different than saying, "I'm
18 going to a doctor to check on it."

19 MS. LOURIE: There's plenty --

20 THE COURT: Hold on, please. 01:32:15

21 So what are you objecting to now?

22 MR. O'CONNOR: Well, I'm objecting to it's violating
23 stipulations. It's opened the door to us that it --

24 THE COURT: Well, when you say it's violating
25 stipulations, you mean it's boxing you in with a stipulation. 01:32:27

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SHERR-UNA BOOKER - Direct

1 Is that your argument?

01:32:31

2 MR. O'CONNOR: Yes. And that this admission where
3 she left is clearly a 403 improper collateral issue. And she's
4 done that on a number of these records. If we let the records
5 in, I get it. If you want to talk about pain and suffering in 01:32:48
6 other areas, you can argue that. But to take it this step --
7 had I known it, I would have come up before but I couldn't get
8 up here to talk to you about it.

9 THE COURT: That's because she was asking document
10 questions. They were right out of the exhibits that you agreed 01:33:03
11 could come into evidence. That's why I was sustaining the
12 relevancy objection. It's in evidence.

13 MS. LOURIE: Can I comment on that? We were told
14 that all information that would be covered by a motion *in*
15 *limine* order would have been redacted. I don't even have the 01:33:18
16 redacted records. I didn't know what they redacted and didn't
17 redact.

18 THE COURT: But you stipulated it in. I mean, there
19 was no objection. If you had a concern about it, you should
20 have objected. It's in evidence. 01:33:31

21 MS. LOURIE: Well, they represented to us that they
22 redacted all of the documents.

23 THE COURT: Well, okay. But you did let it come in
24 without objection. And I don't know if you even talked about
25 this kind of evidence in redactions. Did you? 01:33:45

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1 MS. LOURIE: I didn't have the conversation. 01:33:50

2 MS. HELM: Your Honor, we had a conversation about
3 what should be redacted. The versions that we presented to the
4 Court and that are being shown are redacted.

5 THE COURT: Well, okay. Okay. We've taken enough 01:33:58
6 time at sidebar.

7 Here are my conclusions: The documents that are in
8 evidence are in evidence. They have been admitted into
9 evidence. If you had a concern about them, I don't think you
10 should have agreed for them to come in. And so I had felt that 01:34:15
11 asking about documents in evidence is fair game, just like
12 showing to it a jury is fair game.

13 I do think, however, Ms. Helm, in light of this
14 conversation, that some of your questioning is clearly along
15 the line of a failure to mitigate. And I understand from the 01:34:32
16 sidebar that you have withdrawn that.

17 MS. HELM: I'll stop. Yes, Your Honor. I have.

18 THE COURT: So the failure to mitigate evidence
19 should stop. If you want to request a curative instruction on
20 failure to mitigate, I'll be happy to consider it, instructing 01:34:47
21 the jury that they are not to consider that in some way.

22 But going forward, let's stay away from the failure
23 to mitigate evidence. I do think it's fair for the defendants
24 to present evidence that the complications she is seeking
25 recovery for in the form of pain and suffering were caused by 01:35:08

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SHERR-UNA BOOKER - Direct

1 other sources or other events. That to me is fair because
2 you're seeking pain and suffering but without the failure to
3 mitigate angle.

01:35:10

4 MS. HELM: Understood, Your Honor.

5 THE COURT: Okay.

01:35:18

6 MS. HELM: Thank you.

7 MR. O'CONNOR: There's still that one more series of
8 hospital --

9 THE COURT: And I said if you want a curative
10 instruction, you can certainly request it. And if you think --

01:35:30

11 What time do we have?

12 If you think -- Ms. Booker is going to be here in the
13 case -- after her testimony is done, you need to recall her to
14 address this issue of compensation, I would rather have that
15 discussion further when we're not keeping the jury waiting.
16 But I'm not closing the door to you raising that again.

01:35:47

17 MR. O'CONNOR: Okay. So I will follow your order and
18 I'm not going to try and rehabilitate here right now.

19 THE COURT: Well, you should rehabilitate in every
20 way you can without eliciting testimony that she couldn't
21 afford it.

01:36:04

22 MR. O'CONNOR: I will. I just --

23 THE COURT: In other words, I'm not saying don't
24 redirect her. Do all the redirect you can. But don't go into
25 lack of insurance or lack of money to pay until we've had a

01:36:15

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1 further discussion after her testimony is over.

01:36:19

2 MR. O'CONNOR: And then the other concern I have is
3 they are going to continue to question her about other records
4 where they contend that the filter and its position was missed
5 by radiologists. They have only claimed one doctor --

01:36:41

6 THE COURT: Let me interrupt you.

7 Are you going to ask any more questions on that?

8 MS. HELM: No.

9 MR. O'CONNOR: Okay.

10 THE COURT: All right.

01:36:50

11 Thank you, ladies and gentlemen, for your patience.

12 (End of sidebar discussion.)

13 BY MS. HELM:

14 Q. Ms. Booker, I just have a few more questions. The last
15 time you went to see Dr. Patel was in October of 2017; is that
16 right?

01:37:16

17 A. I believe so.

18 MS. HELM: Your Honor, may this be published? It's
19 been admitted.

20 THE COURT: Yes.

01:37:37

21 THE WITNESS: Is my date of birth supposed to be up
22 there?

23 MS. HELM: We'll make sure that gets redacted.

24 Take it down.

25 \\

United States District Court

SHERR-UNA BOOKER - Direct

1 BY MS. HELM:

01:37:45

2 Q. Did you go see Dr. Patel in October, sometime last fall in
3 2017?

4 A. Yes.

5 Q. And he told you that everything was fine and you didn't
6 need to come back until next year; correct?

01:37:54

7 A. Yes, I have an appointment for next month.

8 Q. Okay. And in January of this is year you went to your
9 primary care doctor and asked for a referral to have someone
10 check on the strut that remains in your IVC; is that right?

01:38:11

11 A. Yes. I was having some pain.

12 Q. And you went and there was a CT scan of the strut; is that
13 right?

14 A. Yes.

15 Q. So that was the first time, in January of 2018, that you
16 had specifically asked any doctor to check on the strut that
17 remains in your IVC; is that right?

01:38:21

18 A. That's not the first time. In the past I asked him --
19 like you asked me before so, yes.

20 Q. Okay. But that was the first time that you had a specific
21 request to check on the strut; is that right?

01:38:38

22 A. No. That's not right, ma'am.

23 Q. Okay. Who else did you ask to check on the strut --
24 not -- the strut that remains in your IVC, after your surgery
25 with Dr. Harvey?

01:38:53

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1 A. I don't know.

01:39:00

2 Q. The only one that you do recall was the one that was in
3 January of 2018; is that right?

4 A. Yes.

5 Q. Thank you. No further questions.

01:39:05

6 THE COURT: All right.

7 Redirect?

8 MR. O'CONNOR: Your Honor, before I start, would this
9 be the appropriate time to offer those exhibits?

10 THE COURT: Yes.

01:39:35

11 MR. O'CONNOR: At this time, plaintiffs would offer
12 1327, 2299, 2301, 2302, 2303, 2304, 2310, 2311, 2321, 2345,
13 2353, 2355, 2361, 2362, 2364, 2368, 4377.

14 MS. HELM: Your Honor, may I approach the podium? I
15 left my list up there?

01:40:54

16 THE COURT: Yes. That's fine.

17 MS. HELM: Thank you.

18 MR. O'CONNOR: Here's where I am. I read all of
19 those in and I stopped there and I'm starting here.

20 MS. HELM: Okay.

01:41:08

21 MR. O'CONNOR: 4377, 4378, 4379, 4380, 4381, 4382.

22 THE COURT: Any objection?

23 MS. HELM: No objection, Your Honor.

24 THE COURT: All right. Those records are admitted.

25 (Exhibit Numbers 1327, 2299, 2301, 2302, 2303, 2304,

01:41:30

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1 2310, 2311, 2321, 2345, 2353, 2355, 2361, 2362, 2364, 2368,
2 4377, 4378, 4379, 4380, 4381, 4382. were admitted into
3 evidence.)

4 **REDIRECT EXAMINATION**

5 BY MR. O'CONNOR:

6 Q. Sheri, after your filter was implanted by Dr. Kang in
7 2007, did you have any reason to believe or know that that
8 filter would go into complications such as fracture, tilt,
9 migration, perforation?

10 A. I'm sorry. You said that the Kang?

11 Q. I apologize. Dr. D'Ayala. Thank you. In 2007, the
12 doctor that implanted the filter. When you had that filter
13 implanted, did you think about it failing or causing
14 complications?

15 A. No. I didn't know anything about filters so I had no
16 reason to.

17 Q. You've heard evidence in this case where Bard was aware of
18 filter failures fractures and tilts and perforations and
19 migrations. After you received -- before you even had your
20 filter -- after you had your filter in 2007, did you ever
21 receive a letter from Bard telling you that the G2 filter was
22 dangerous or would go into complications?

23 A. Not at all. Not at all.

24 Q. Would you have wanted your doctors to know what we learned
25 in this case, that Bard knew that the G2 was, in fact, failing?

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SHERR-UNA BOOKER - Redirect

1 A. Yes. I think it would have been the human thing to do. 01:43:54

2 Q. Would you have wanted to know what Bard knew when you
3 agreed to have that filter implanted?

4 A. Not that particular one. Maybe if my doctors had been
5 aware they knew of a better filter. If they are telling me 01:44:10
6 that that's what I need, then I'm going to do that. But if
7 they knew that information, I'm sure they would have chose
8 something else.

9 Q. So if Bard was aware before your filter was ever put in
10 you, the G2, that that G2 was failing, is that something you 01:44:27
11 would have expected Bard to tell your doctors?

12 A. Absolutely. I think it's their duty to.

13 Q. Did you have any indication when you agreed to have your
14 filter put in and you talked to Dr. D'Ayala that some day you
15 would be looking at surgeries to remove the filter from your 01:44:46
16 heart?

17 A. I'm sorry. Can you repeat that?

18 Q. Sure. The day that he went in in 2007 to have the G2
19 Filter implanted, did you have any reason to know, any reason
20 to believe that some day you would be confronted with the need 01:45:12
21 for a surgery of your heart to remove a piece of that filter
22 out?

23 A. No, not at all.

24 Q. Did you ever consent to having a dangerous defective
25 filter that tilted, perforated or migrated to your heart put in 01:45:32

SHERR-UNA BOOKER - Redirect

1 you?

01:45:37

2 A. No, I did not.

3 Q. At any time if you were contacted by doctors who had been
4 contacted by Bard to come back in for your filter to be
5 monitored, would you do that? Would you have done that?

01:45:53

6 A. Absolutely.

7 Q. And from what you've heard here in this trial, this case,
8 have you seen any evidence that Bard, from what they knew, made
9 any effort to tell the doctors to get their patients back in
10 and get those filters monitored, looked at or taken out?

01:46:11

11 A. No. I actually heard the contrary. One doctor, I don't
12 remember his name, said that he requested the names of his
13 patients so he can get them removed.

14 Q. You were in the hospital when you had your G2 filter; is
15 that right?

01:46:30

16 A. That is correct.

17 Q. Did you know or did your doctor have any options to put in
18 any other filters? Did you even know that?

19 A. No, I did not. I didn't know anything about filters.

20 Q. And when you had your filter put in, the day you made that
21 decision, did you have any knowledge of the risk and
22 complications that you years later experienced about the G2
23 when you had it put in?

01:46:47

24 A. No, sir.

25 Q. Did you assume any of the risks -- did you believe you

01:47:04

SHERR-UNA BOOKER - Redirect

1 were going to assume any risk of a complication of that filter
2 that would some day cause you to have heart surgery when you
3 told -- when you agreed that Dr. D'Ayala could put the G2
4 filter in you?

01:47:11

5 MS. HELM: Your Honor, object to the question. It
6 calls for a legal conclusion.

01:47:23

7 THE COURT: Overruled.

8 THE WITNESS: No, sir.

9 BY MR. O'CONNOR:

10 Q. Now, early in your cross-examination you were asked a
11 question early on that you asked a doctor to check your filter.
12 Do you recall that?

01:47:56

13 A. Yes, I remember the question.

14 Q. Why did you ask that doctor to check your filter?

15 A. Well, the last time was because I did have pain in my
16 abdomen and I do know that that filter is in that area. I
17 mean, it's in my --

01:48:13

18 Q. Early on when you were asked about the PET scan I thought.
19 Is that just because you knew you had a foreign body?

20 A. That's exactly what I had said -- I mean I had said before
21 in a question, that I had something foreign in my body. I was
22 curious.

01:48:29

23 Q. Did you ever have any reason to ask a doctor to check on
24 your filter because you had any knowledge, any reason to
25 believe that that filter was breaking inside of you and

01:48:45

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1 traveling to your heart?

01:48:48

2 A. No.

3 Q. And if Bard notified doctors and your doctor and you got a
4 call from your doctor to come back in to check your filter,
5 what would you have done?

01:49:05

6 A. I would have done what my doctors requested me to do.

7 Q. Did you ever ask a doctor if you should have it removed?

8 A. I don't remember but I think one time I may have asked
9 questions about it. Actually -- I'm sorry. It's so hard

10 sometimes to remember things but I do remember maybe a couple
11 much months, maybe within a year of it being placed, if it was
12 going to be removed. I just asked and I was told at that point
13 it was better to just leave it in. Which doctor it was I don't
14 know. I had seen many at that time in between, oncologists and
15 everybody else I needed to see.

01:49:44

01:50:05

16 Q. And Sheri, you heard evidence that that G2 filter that you
17 received, you heard evidence in this case that that was clear,
18 that filter you got was cleared as a permanent filter. Have
19 you heard that?

20 A. Yes, I did hear that.

01:50:20

21 Q. As a patient who received a G2 filter that was cleared to
22 be a permanent filter, did you have -- did you have reason to
23 expect that that filter should and could last in your vena cava
24 in exactly the same position that it was when Dr. D'Ayala put
25 it in? Was that your expectation?

01:50:43

1 A. My expectation was it to be the way Dr. D'Ayala put it in, 01:50:45
2 yes. I didn't expect it to move or do anything else.

3 Q. To move, to break, to go to your heart?

4 A. There was no reason -- once again, I didn't know anything
5 about filters. 01:51:05

6 Q. Those were contrary to any expectation you had about a
7 filter; right?

8 A. Yes.

9 MR. O'CONNOR: Thank you, Your Honor. That's all I
10 have. 01:51:18

11 THE COURT: All right. You can step down, Ms.
12 Booker.

13 (Witness excused.)

14 THE COURT: Ladies and gentlemen, if you want to
15 stand up while we're waiting for the next witness, feel free. 01:51:52

16 MS. REED ZAID: Our next witness is Shomari Cottle.

17 COURTROOM DEPUTY: Come on up. If you'll stand right
18 here and raise your right hand, please.

19 (SHOMARI COTTLE, a witness herein, was duly sworn or
20 affirmed.) 01:52:31

21 COURTROOM DEPUTY: Could you spell your name for us,
22 please, your first and last name, please.

23 THE WITNESS: Shomar, S-H-O-M-A-R-I. Last name,
24 Cottle, C-O-T-T-L-E.

25 COURTROOM DEPUTY: Thank you, sir. Please come have 01:52:50

1 a seat.

01:52:52

2 **DIRECT EXAMINATION**

3 BY MS. REED ZAID:

4 Q. Good afternoon.

5 A. Good afternoon.

01:53:13

6 Q. Can you introduce yourself to the jury?

7 A. Yes. My name is Shomari Cottle.

8 Q. And where do you live?

9 A. In Franklin Lakes, New Jersey.

10 Q. And how long have you lived there?

01:53:21

11 A. For about two years now.

12 Q. And when did you arrive here in Phoenix?

13 A. Yesterday.

14 Q. Did you go to high school there?

15 A. Yes. I went to high school in New York.

01:53:32

16 Q. So not in New Jersey, but in New York?

17 A. Yes.

18 Q. Did you grow up in New York?

19 A. Yes.

20 Q. Where?

01:53:41

21 A. In the Bronx, in Brooklyn.

22 Q. So you went to high school in Brooklyn. What was the name
23 of your high school?

24 A. Bronx School for Law, Government & Justice.

25 Q. And did you go to college?

01:53:51

SHOMARI COTTLE - Direct

1	A.	Yes, ma'am.	01:53:53
2	Q.	And did you get a degree?	
3	A.	Yes, ma'am.	
4	Q.	And where did you go to college?	
5	A.	Gwinnett College in Lilburn, Georgia.	01:53:55
6	Q.	And what was your degree?	
7	A.	I got my associate's in business and accounting.	
8	Q.	And do you work now?	
9	A.	Yes, ma'am.	
10	Q.	Where do you do?	01:54:05
11	A.	I'm a store manager at Babies "R" Us.	
12	Q.	Okay. And needless to say, is Sheri Booker your mother?	
13	A.	Yes.	
14	Q.	And do you have any siblings?	
15	A.	Yes, I do.	01:54:16
16	Q.	All right. How many?	
17	A.	Altogether? Nine. From my mom, just my little brother,	
18		Malik.	
19	Q.	And where does Malik live?	
20	A.	He lives with me in Franklin Lakes.	01:54:30
21	Q.	Are you close to him?	
22	A.	Yes.	
23	Q.	How old is he?	
24	A.	He's 21.	
25	Q.	And how old are you?	01:54:35

United States District Court

SHOMARI COTTLE - Direct

1	A. I'm 27.	01:54:36
2	Q. Living in New Jersey, how often do you get to see your	
3	mom?	
4	A. Not as often as I would like. But whenever I can take a	
5	trip to see her, I do.	01:54:45
6	Q. Shomari, what kind of mom was your mother growing up?	
7	A. My mom was a strict mom but she was also very fun, very	
8	energetic.	
9	Q. Does she sing?	
10	A. Yes. She does.	01:55:02
11	Q. Did she sing while you were growing up?	
12	A. Yes, she did, a lot.	
13	Q. And can you quickly describe for me your best memory of	
14	being with your mom?	
15	A. My best memory, probably the -- one of the first years we	01:55:11
16	were in North Carolina and it had snowed down there. I never	
17	knew it snowed down south, first of all, being from New York	
18	but it was about two or three feet of snow and I remember it	
19	blocked the entire doorway almost like to the doorknob. And	
20	the trees froze over and bent all the way down and they were	01:55:33
21	like sticking to the glass of the house.	
22	Q. So you were snowed in with your mom?	
23	A. Yeah. And then we had like a snowball fight outside and	
24	we went sledding on the hill in the back.	
25	Q. How old were you then?	01:55:47

United States District Court

SHOMARI COTTLE - Direct

1	A.	I was about maybe eight years old.	01:55:48
2	Q.	Can you describe the worst memory of being with your mom?	
3	A.	When she went through her heart situation, probably the	
4		first time I thought I would actually lose my mother.	
5	Q.	Okay. Let's fast forward a little bit to that. Were you	01:56:04
6		with your mother when you found out -- when she found out that	
7		she needed heart surgery?	
8	A.	Yes.	
9	Q.	And where was that?	
10	A.	It was at the hospital. She had called me in to go see	01:56:13
11		her and she let me know that the doctor said that they would	
12		need to operate on her.	
13	Q.	Okay. And how was she when she got that news, when she	
14		shared it with you?	
15	A.	She was very sad and down. You could tell that she was	01:56:31
16		tired, just exhausted from being there and now having to go	
17		through a surgery.	
18	Q.	She was upset?	
19	A.	Yes.	
20	Q.	Was she scared?	01:56:45
21	A.	Yes.	
22	Q.	Were you scared?	
23	A.	Yes, very much.	
24	Q.	Were you scared in front of her?	
25	A.	I tried not to be but I don't think you can really hide	01:56:51

United States District Court

SHOMARI COTTLE - Direct

1 anything from your mother. You can ask anyone that.

01:56:55

2 Q. Okay. How long were you with her during that visit?

3 A. For a couple of hours. I was with her almost the whole
4 day.

5 Q. And that was the visit where -- was that a visit where she
6 learned she needed heart surgery?

01:57:10

7 A. Yes.

8 Q. Okay. Did you take her home that day?

9 A. Yes, I did.

10 Q. Okay. Were you worried about her?

01:57:18

11 A. Yes. I kept checking on her throughout the night just to
12 even make sure she was still breathing. I wanted to actually
13 go lay with her in bed but I was probably too old to do that at
14 that point, but I just -- I don't know. It was a feeling of I
15 may lose my mom. I was very scared.

01:57:39

16 Q. Were you living with her during that time?

17 A. Yes.

18 Q. Who else was living with you at that time?

19 A. My grandmother and my Uncle Paris, P-A-R-I-S.

20 Q. And how long between the time that you were with her when
21 she learned she needed heart surgery and the heart surgery? Do
22 you remember?

01:57:56

23 A. About two weeks.

24 Q. And you were with her the whole time?

25 A. Yes.

01:58:08

United States District Court

SHOMARI COTTLE - Direct

1	Q. Did you work during that time?	01:58:08
2	A. Yes, I did.	
3	Q. Did you have to help her with anything? How was she doing	
4	during those two weeks?	
5	A. She was very, I guess, trying to stay happy but you could	01:58:19
6	tell she was sad. She was tired. She was having shortness of	
7	breath. So I just tried to do as much as possible, went and	
8	did the food shopping, whatever needed to be done in the house,	
9	whatever she asked for.	
10	Q. Did she have some good days during that time period? How	01:58:34
11	long was that between the visit and then the heart surgery?	
12	A. About two weeks.	
13	Q. Okay. And during that time, did she have any good days?	
14	A. Yes, she did. She had some good days. One day we went	
15	out to the pool just so she could sit over there and have a	01:58:51
16	change of scenery. We would go walking in the back.	
17	Q. Okay. Was she -- did you have a sense that she was afraid	
18	during that time period waiting for the surgery?	
19	A. Yeah. You could tell that she was just anticipating it.	
20	You could just see it in her face. She was trying to smile but	01:59:12
21	the smile was really holding back her sadness.	
22	Q. And let's fast forward those two weeks to the day of the	
23	surgery. Did you take her to the hospital?	
24	A. Yes.	
25	Q. And how was she on the way there?	01:59:24

United States District Court

SHOMARI COTTLE - Direct

1 A. You could tell she was bothered and worried, scared. I
2 think anyone that has to get their heart worked on, I think
3 anyone would be scared. She was trying to put on a very strong
4 front but I don't think it was working, especially with me.

5 Q. Was she worried about you?

6 A. Yeah.

7 Q. Was she worried about your brother, Malik?

8 A. Yes. She told me if anything happened to her, don't
9 worry, everything would be taken care of, that to just look
10 after my brother and make sure that he's okay, to not worry
11 about her. But that's kind of hard.

12 Q. Did you see her before she went back for surgery?

13 A. What was the question?

14 Q. I'm sorry. Did you see her before she went back to
15 surgery?

16 A. Yes.

17 Q. And how was she doing?

18 A. When you say "went back to surgery," do you mean went back
19 for the second time?

20 Q. No. I actually mean you took her to the hospital. Did
21 you see her right before they took her back?

22 A. Oh. Yes. Before she went in, we all stood in the room
23 and we prayed together, gave her a hug and a kiss and
24 everything, just tried to raise her spirits.

25 Q. And do you recall how long she was in surgery?

United States District Court

SHOMARI COTTLE - Direct

1 A. No.

02:00:43

2 Q. But you were there the whole time?

3 A. Yes. It was a couple hours probably. I don't know the
4 exact time.

5 Q. Okay. Did you see her when she came out?

02:00:50

6 A. Not immediately after but a little while after. She was
7 still groggy. You could tell she was heavily sedated. She was
8 pale, looked exhausted, had all of these wires and tubes in her
9 but yeah. She didn't look good.

10 Q. Were you able to talk to her?

02:01:14

11 A. A little bit, not as much. She was a little groggy and
12 then I didn't want her to have to speak unnecessarily.

13 Q. Were you with her when she learned that she needed a
14 second surgery?

15 A. Yes.

02:01:30

16 Q. And how did she react to that?

17 A. She sounded a little defeated because everything couldn't
18 be done the first time, the fact that she had to be operated on
19 again. She was just very down. She was very down.

20 Q. How did that affect you and your brother?

02:01:49

21 A. It made me very sad. I didn't know exactly what to do or
22 what to say. I was just trying to be there for her and my
23 brother and the rest of the family.

24 Q. Before she went in for her second surgery, did she get her
25 affairs in order?

02:02:07

United States District Court

SHOMARI COTTLE - Direct

1 A. I believe so because she told me everything was taken care
2 of, so I would assume yes, that she did. She told me
3 everything was taken care of.

4 Q. And did that mean to you? What did you understand that to
5 mean?

6 A. That if she was to pass, that her will and everything was
7 taken care of and notarized and my grandmother would be taken
8 care of as well.

9 Q. And she was still in the hospital; correct?

10 A. Yes.

11 Q. And how was she feeling before the second surgery?

12 A. She was still down and sad. She was trying to be as
13 optimistic as possible, but you could tell she was still
14 worried and scared about what was going on.

15 Q. Was she worried for you and Malik?

16 A. Yes. I believe she probably actually worried more about
17 us and our well-being than herself, just like any mother.

18 Q. Did you see her right before she went back in for the
19 second surgery, meaning wheeled back?

20 A. Yes.

21 Q. And did she say anything to you?

22 A. She said just stay positive and just -- she just kept
23 repeating to look after my brother.

24 Q. How long was she back in surgery? How long did you way
25 wait for her?

United States District Court

SHOMARI COTTLE - Direct

1 A. A few hours. I don't know the exact timing. I just
2 remember it being in the waiting room.

02:03:29

3 Q. And what was that like to wait for your mom when she was
4 in heart surgery?

5 A. It's a drag because you never know what's going to happen.
6 You just are looking at the clock constantly. You feel like
7 time has passed and it hasn't. It's only been two minutes and
8 you feel like an hour.

02:03:37

9 Q. Did anyone update you while you were back in surgery?
10 Were you able to get updates?

02:03:54

11 A. I believe the doctor communicated to my uncle and
12 everything because we just waited in the waiting room and would
13 come out and say she's doing well. That's about it.

14 Q. And did you see her when she came out?

15 A. Yes.

02:04:08

16 Q. And how did she look?

17 A. She looked exhausted, drained. She had this little heart
18 pillow she was holding onto, very sad. It wasn't the mother I
19 knew.

20 Q. Shomari, I'm going to show you a photograph of your mother
21 in the hospital.

02:04:26

22 MS. REED ZAID: 2426. Can you see the picture on the
23 screen yet?

24 THE WITNESS: No, ma'am.

25 \\

United States District Court

SHOMARI COTTLE - Direct

1 BY MS. REED ZAID:

02:05:26

2 Q. Can you see it now?

3 A. Yes.

4 Q. And is this a picture of your mother in the hospital right
5 after her second heart surgery?

02:05:31

6 A. Yes.

7 Q. And does it depict her accurately after her second
8 surgery?

9 A. Yes, it does.

10 Q. You see that it's her?

02:05:38

11 A. Yes.

12 MS. REED ZAID: Your Honor, I would like to offer
13 Exhibit 2426 into evidence and publish it for the jury.

14 MS. HELM: No objection, Your Honor.

15 THE COURT: Admitted and you may publish.

02:05:47

16 (Exhibit Number 2426 was admitted into evidence.)

17 BY MS. REED ZAID:

18 Q. Do you recall if this was your mother's appearance right
19 after her second surgery?

20 A. Yes, it was.

02:06:01

21 Q. Did you go in and actually see her like this?

22 A. Yes, I did.

23 Q. Were you able to spend time with her?

24 A. Yeah. I was able to spend time with her.

25 Q. Was she able to perceive you? Was she able to perceive

02:06:15

United States District Court

SHOMARI COTTLE - Direct

1 you? Did she know that you were in the room when she was in
2 this state?

3 A. I believe so, yes.

4 Q. Shomari, do you know how long she was like this, meaning
5 this depiction of her on machines and breathing tubes?

6 A. For a couple of hours until they knew she could breathe on
7 her own.

8 Q. All right. Shomari, I'm going to show you another
9 photograph of your mother in the hospital. It's Exhibit 2427.

10 A. Yes, ma'am.

11 Q. Do you see that?

12 A. Yes.

13 Q. And this is this an accurate depiction of your mother in
14 the hospital after she had been released from the breathing
15 machines?

16 A. Yes, ma'am.

17 Q. I would like to move 2427 into evidence, Your Honor, and
18 publish it for the jury.

19 MS. HELM: No objection, Your Honor.

20 THE COURT: Admitted. And you may publish.

21 (Exhibit Number 2427 was admitted into evidence.)

22 BY MS. REED ZAID:

23 Q. And, again, now that the jury can see this, is this your
24 mother after she was released from the breathing machine?

25 A. Yes, ma'am.

United States District Court

SHOMARI COTTLE - Direct

1 Q. Were you able to have your interaction with your mother
2 when she was like this?

02:07:27

3 A. Yes, ma'am.

4 Q. Do you remember how long she was in the hospital after
5 this, Shomari?

02:07:41

6 A. After the second surgery?

7 Q. Yes, sir.

8 A. Under a week, a couple days.

9 Q. Were you there every day with her?

10 A. Yeah. I came every day after work and if I didn't have to
11 work, I was there.

02:07:50

12 Q. Okay. Did you see her doing any sort of rehabilitation
13 after this surgery, any exercises or anything?

14 A. Just trying to walk. I remember her holding that heart
15 pillow and the doctors telling her she had to try to walk and
16 get some mobility, her going down the hallways and being
17 stubborn and not wanting help but you could tell she needed it.

02:08:09

18 Q. And were you there helping her, walking with her and
19 everything?

20 A. Yes, ma'am.

02:08:27

21 Q. How did that make her feel to have her son helping her
22 now?

23 A. I don't think it made her very happy, especially the
24 entire time she's been the head of household, the one that
25 holds everything together and now me, her child, is the one

02:08:39

United States District Court

SHOMARI COTTLE - Direct

1 having to help her.

02:08:42

2 Q. How were her spirits in those first few days after she
3 came out of anesthesia and you saw her?

4 A. She was still a little down but it was getting better. As
5 the days progressed, you could see her getting a little bit
6 more spirited knowing that at least the second time it was more
7 successful.

02:08:56

8 Q. Was she more hopeful?

9 A. Yes.

10 Q. And did you take her home?

02:09:10

11 A. Yes.

12 Q. And can you tell the jury her physical state when you got
13 her home generally?

14 A. She was exhausted. She couldn't really move. I know she
15 was in pain. Just walking to the bathroom was tough. We had
16 to sometimes help her to get in and out of bed. It was just a
17 process.

02:09:22

18 Q. When you say "we," who is "we"? Who else was with you?

19 A. Me, my grandmother, my brother while he was there, my
20 uncle, anyone that was there would help.

02:09:41

21 Q. They were all helping with her care?

22 A. Yes.

23 Q. Did your grandmother do anything specific for her in the
24 home while she was recovering?

25 A. She did most of the cooking. She laid with her at night

02:09:53

United States District Court

SHOMARI COTTLE - Direct

1 at times. She just talked to her, just giving her that
2 shoulder to lean on.

02:09:59

3 Q. Did she have to do personal things for her?

4 A. Yes. She had to bathe her because she couldn't really do
5 that on her own. I would help her to the bathroom but as far
6 as being in the bathroom, my grandmother would help with that.
7 That's, yeah, about it.

02:10:14

8 Q. And how did it make your mother feel to have her mother
9 helping her during that time, helping her with those private
10 activities?

02:10:36

11 A. She didn't like it very much at all, especially as
12 independent as my mother is to now once again have her mother
13 having to help and nurse her, she didn't like that very much at
14 all.

15 Q. And how is it for you and your brother during this time
16 watching her recover?

02:10:51

17 A. It was a tough process but we just had to stay positive.
18 It was sad for both of us. We just spoke about it in private.
19 It was a tough time.

20 Q. And did your mom progressively start to recover?

02:11:09

21 A. Yeah. Little by little as the days went on, you could see
22 she could move a little bit more and then as the weeks
23 progressed, you know, she was able to get out of the bed on her
24 own and we could not really walk outside but we would take a
25 short walk, so she was just progressing as time went along.

02:11:32

United States District Court

SHOMARI COTTLE - Direct

1 Q. Did her confidence get better?

02:11:35

2 A. Yes, it did. You could see her smile genuinely coming
3 out. Her laughter was a little bit more even though she
4 couldn't do it very much because it would hurt her chest, but
5 yes.

02:11:49

6 Q. And how about her morale, did it gradually increase?

7 A. Yeah, it did. Definitely very much so. You could just
8 feel her energy getting more positive and seeing it in her face
9 and just every day little things.

10 Q. When you spend time with your mom, is she still concerned
11 about what happened to her?

02:12:04

12 A. Yes.

13 Q. She expressed that to you?

14 A. Yes.

15 Q. What specifically does she express?

02:12:12

16 A. Well, she never knows what can and cannot happen.
17 Tomorrow is never promised. She worries that there's also a
18 piece still inside of her that can shift at any moment or move.

19 Q. Do you know your mom hiked Stone Mountain?

20 A. Yes.

02:12:42

21 Q. Was that a milestone for her?

22 A. Yes, it was, very much so because I got a phone call from
23 it when she got up there. She took a picture and everything.
24 And she had been talking about it for a while and when she
25 finally accomplished it, she was very, very happy.

02:12:58

United States District Court

1 Q. And looking at what your mother went through that you were 02:13:01
2 there and you saw and experienced with her and seeing how she's
3 progressed along and as you said remained positive and hopeful,
4 are you proud of your mom?

5 A. Yes, very much so, especially all she's gone through. I 02:13:13
6 don't know if I would ever be as strong as she is but she
7 definitely sets a great example.

8 MS. REED ZAID: I have nothing further.

9 THE COURT: Cross-examination?

10 MS. HELM: No questions, Your Honor. 02:13:28

11 THE COURT: All right. Thank you. Sir, you can step
12 down.

13 THE WITNESS: Thank you.

14 (Witness excused.)

15 MS. REED ZAID: Our next witness is appearing by 02:13:55
16 videotape.

17 THE COURT: All right. If you want to stand up for a
18 minute, ladies and gentlemen, while this gets set up, feel
19 free.

20 MS. REED ZAID: I apologize to the Court, Your Honor, 02:15:26
21 and to the jury.

22 I apologize, Your Honor. We don't have a lot of room
23 at that table and things get stacked and folders run away.

24 The next witness by videotape is Gin Schulz. She
25 received her bachelor's degree in chemical engineering from the 02:16:29

1 University of Missouri in 1981 and received a master's degree 02:16:31
2 in business administration in 2003. She joined Bard Peripheral
3 Vascular, or BPV, in October of 2005 as Vice President of
4 Quality Assurance. In this role she was responsible for
5 overseeing the quality systems, ensuring BPV was compliant with 02:16:48
6 regulations and hiring and managing the Quality Assurance
7 staff.

8 In 2011 Ms. Schulz transferred to C.R. Bard to be the
9 Vice President of Quality Operations, a role from which she
10 just recently retired. 02:17:05

11 Prior to working at BPV, she had a 15-year career at
12 Johnson & Johnson and its medical device subsidiaries where she
13 held various positions including manager of Quality and
14 Compliant Services.

15 THE COURT: Would you please spell her name? 02:17:19

16 MS. REED ZAID: It's Schulz. S-C-H-U-L-Z.

17 THE COURT: All right.

18 MS. REED ZAID: And we have a list of evidence to
19 move in, Your Honor. Trial Exhibit 1948, Deposition Exhibit 2;
20 Trial Exhibit 1950 which is Trial Exhibit -- Deposition 4. 02:17:35
21 Trial Exhibit 1951 and the deposition number was five; Trial
22 Exhibit Number 1940. Deposition Exhibit 11. Trial Exhibit
23 1941, Deposition Exhibit 12; Trial Exhibit 1944, which is
24 Deposition Exhibit 15; Trial Exhibit 1945 is Deposition Exhibit
25 16; Trial Exhibit 1946 is Deposition Exhibit 17; Trial Exhibit 02:18:19

1 735, Deposition Exhibit 20; and Trial Exhibit 1949, Deposition
2 Exhibit 21. I would like to move these into evidence at this
3 time, Your Honor.

4 THE COURT: Any objection?

5 MS. HELM: No, Your Honor.

6 MS. REED ZAID: Thank you.

7 THE COURT: All right. Those exhibits are admitted.
8 And you may play the deposition testimony.

9 (Exhibit Numbers 1948, 1950, 1951, 1940, 1941, 1944,
10 1945, 1946, 735, 1949 were admitted into evidence.)

11 (Whereupon the deposition of Gin Schulz was played.)

12 THE COURT: Counsel, can we turn down just a little
13 bit?

14 Let's stop the video there.

15 All right. Members of the jury, we've reached 2:30.
16 We will plan to resume at 2:45. We will excuse you at this
17 time.

18 (Jury departs at 2:29.)

19 (Recess at 2:29; resumed at 2:46.)

20 (Jury enters at 2:46.)

21 (Court was called to order by the courtroom deputy.)

22 THE COURT: Thank you. Please be seated.

23 Counsel, you may continue with the deposition.

24 (The deposition of Gin Schulz continues to be
25 played.)

1 MR. LOPEZ: That concludes that deposition, Your
2 Honor.

3 THE COURT: All right.

4 MS. REED ZAID: The next witness appearing by
5 videotaped is Guillermo, or Bill, Altonaga. Guillermo Altonaga 03:10:06
6 practiced as an optometrist for 19 years after which he began
7 working for a medical device companies in its Field Assurance
8 Department. In 2008 he began work with Bard Peripheral
9 Vascular as a consultant and then in 2010 became a full-time
10 employee of BPV working in Quality Assurance and Medical 03:10:30
11 Affairs where his responsibilities included providing clinical
12 input to failure modes and analyses, health hazard evaluation,
13 and promotional materials. He's not a licensed medical doctor.

14 MS. HELM: Excuse me, Your Honor. Just so the record
15 is clear, he's an ophthalmologist, not an optometrist. 03:10:54

16 MS. REED ZAID: This is the agreed-upon statement to
17 be read into the record.

18 MR. LOPEZ: Your Honor, he's an optometrist he said
19 at his deposition.

20 MS. REED ZAID: There's one document to be moved into 03:11:22
21 evidence, Your Honor. It's Trial Exhibit 546 which is
22 Deposition Number 4.

23 MS. HELM: No objection.

24 THE COURT: 546 is admitted.

25 (Exhibit Number 546 was admitted into evidence.) 03:11:43

1 (Whereupon the video deposition of Guillermo Altonaga 03:11:58
2 was played.)

3 MR. LOPEZ: Your Honor --

4 Please stop it.

5 I don't know that anyone could have heard that 03:21:49
6 question. Would you mind if I read? It. It was the court
7 reporter reading the question.

8 THE COURT: You can read the question and the answer.

9 MR. LOPEZ: Question: Would it be your expectation
10 that when Bard launched a filter for commercial use that Bard 03:22:02
11 would have an awareness about the long-term clinical
12 performance of that device?

13 Answer: Yes.

14 (The video deposition of Mr. Altonaga continues to be
15 played.) 03:22:39

16 MS. REED ZAID: The next witnesses appearing by
17 videotape is Robert Ferrara. Robert Ferrara has a mechanical
18 engineering degree from Polytechnic University and an
19 M.B.A. from Dowling College. He was a sales representative at
20 the GlaxoSmithKline from 2002 to 2004. He worked as a sales 03:31:05
21 representative at C.R. Bard from 2004 to 2011 and during this
22 time sold Bard's IVC filters. He currently works for
23 Medtronic, another medical device manufacturer.

24 And, Your Honor, I would like to move into evidence
25 Trial Exhibit 1103 (sic, corrected later in trial) which is 03:31:28

1 Deposition Exhibit Number 3, and Trial Exhibit Number 905,
2 Deposition Exhibit 19.

3 THE COURT: Any objection?

4 MS. HELM: No objection, Your Honor.

5 THE COURT: All right. Those are admitted.

6 (Exhibit Numbers 1130 and 905 were admitted into
7 evidence.)

8 (Whereupon the video deposition of Robert Ferrara was
9 played.)

10 MS. REED ZAID: Next witness appearing by videotape,
11 which is only four minutes long, is Jason Greer. Jason Greer
12 graduated from the University of Mississippi and became a sales
13 representative at Bell South Mobility in 1991 and worked for
14 two other companies doing sales until he joined Bard Peripheral
15 Vascular in 1999 as a sales representative. In 2005 he became
16 a district manager and throughout his time at Bard, he sold
17 Bard's IVC filters. Mr. Greer left Bard in 2007 and currently
18 works at another medical device manufacturer.

19 We would like to move one exhibit into evidence, Your
20 Honor. It's Trial Exhibit 1912, Deposition Exhibit Number 7.

21 MS. HELM: Excuse me, Your Honor. No objection.

22 THE COURT: 1912 is admitted.

23 (Exhibit Number 1912 was admitted into evidence.)

24 MS. REED ZAID: Thank you.

25 Ladies and gentlemen, if you want to stand up while

1 we start this, go head. We've got 25 minutes to go and if you
2 need to stretch, feel free and if you don't, that's okay, too.

03:51:48

3 (Whereupon the video deposition of Jason Greer was
4 played.)

5 MS. REED ZAID: The next witness to appear by
6 videotape is Christopher Ganser. Christopher Ganser is a
7 graduate of the California State University in Long Beach. He
8 earned a bachelor of science in industrial technology and
9 quality assurance.

03:56:53

10 He began his career with C.R. Bard in 1994 and worked
11 in Quality Assurance. Mr. Ganser was Vice President,
12 Regulatory Science, at C.R. Bard from 2005 through 2006 and
13 Vice President, Quality Environmental Services and Safety, from
14 2007 through 2011 when he left Bard.

03:57:05

15 Mr. Ganser currently runs his own consulting firm and
16 consults with medical device manufacturing.

03:57:27

17 There's one exhibit we would like to move into
18 evidence Your Honor. It's Trial Exhibit 4328, Deposition
19 Exhibit 517.

20 MS. HELM: No objection, Your Honor.

03:57:47

21 MS. REED ZAID: And the tape is 16 minutes.

22 THE COURT: It is admitted.

23 (Exhibit Number 4328 was admitted into evidence.)

24 (Whereupon the video deposition of Christopher Ganser
25 was played.)

04:01:47

1 MS. REED ZAID: The next witness appearing by video 04:14:42
2 is Dr. Frederick Rogers. Dr. Frederick Rogers specializes in
3 critical care and has over 37 years of experience in the field
4 of medicine. He is board certified in surgery and surgical
5 critical care. He graduated from the University of Vermont 04:14:57
6 College of Medicine with his medical degree in 1981.

7 In 2008 Dr. Rogers assumed the Trauma Medical
8 Directorship at Lancaster General Hospital, a Level II trauma
9 center in southeastern Pennsylvania; and in January of 2017 he
10 became Director of the Lancaster Hospital Clinical Research 04:15:20
11 Program.

12 He has conducted clinical research involving IVC
13 filters for more than 20 years. Dr. Rogers is not being
14 presented as an expert witness by either party.

15 There are no exhibits to be entered. 04:15:35

16 THE COURT: All right. We'll just go for four
17 minutes and break. 4:20, ladies and gentlemen.

18 (Whereupon the video deposition of Dr. Frederick
19 Rogers was played.)

20 THE COURT: All right, sir. Let's stop it, counsel. 04:19:40

21 All right, ladies and gentlemen, thanks for your
22 attention today. We will plan to start at 9 o'clock tomorrow.
23 We will excuse the jury at this time.

24 (Jury departs at 4:19.)

25 THE COURT: Please be seated. 04:20:11

1 Counsel, how have you allotted time for the
2 depositions played today?

3 MS. HELM: I sent her the numbers.

4 I apologize, Your Honor. She took my notes but I
5 have it by email.

6 THE COURT: Well, counsel, I'll tell you what. Why
7 don't you work it out. We're going to take a ten-minute break
8 for the court reporter before we start talking about jury
9 instructions and you can give me those when I come back.

10 (Recess at 4:21; resumed 4:30.)

11 (Court was called to order by the courtroom deputy.)

12 THE COURT: Please be seated.

13 All right. Counsel, what did you work out on the
14 time?

15 MS. HELM: Your Honor, prior to -- and not including
16 the last video that is midway through, 30 minutes for the
17 defendant.

18 THE COURT: Okay.

19 All right. So as of the end of the today, plaintiffs
20 have used 24 hours and 18 minutes and defendants have used
21 seven hours and 26 minutes.

22 I know you know from the math that means plaintiffs
23 have four hours and 40 minutes left for everything, closing,
24 punitive time and cross-examinations. And I can't let you go
25 over that amount of time because we have our whole trial

1 schedule built on it.

04:33:46

2 A question. You all said that one of the exhibits
3 being admitted today was 1103 and that is not on the exhibit
4 list.

5 Traci, what did you think it might be?

04:33:59

6 COURTROOM DEPUTY: 1130.

7 THE COURT: She thought maybe it was 1130 but it was
8 read in as 1103.

9 MR. O'CONNOR: Do you know which witness that was?

10 THE COURT: It was during Ferrara.

04:34:19

11 MS. REED ZAID: It is 1103 written on my resource.
12 Let me double-check. You think it was three zero? Okay. I
13 will check it.

14 THE COURT: That's fine. We don't need to worry
15 about it now but if we could just address that.

04:35:00

16 Let me mention one other thing. I don't think
17 there's anything we can do about it for this trial but for the
18 next you might. There have been two instances I remember
19 distinctly and probably four or five where an exhibit was shown
20 on the screen during a deposition excerpt that had not been
21 moved into evidence in connection with that deposition and the
22 witness was asked about it.

04:35:19

23 I know that's happened twice that I specifically
24 noted today and I think it happened two or three times before
25 that.

04:35:36

1 So as you go forward, please double-check your
2 experts against the exhibits that are being moved in.

3 As I say, I don't think there's anything we can do
4 about that now because it when came up on the screen, I
5 couldn't correlate it to any exhibit in evidence because the
6 number didn't -- the deposition number didn't match or it was
7 mentioned a number that hadn't been moved in.

8 So just take that into account if you would when we
9 do depo presentations in the next trial.

10 All right. Jury instructions. I don't know of a
11 more efficient way to do this than to just get each side's
12 comments on the instructions, so I think what I want to do is
13 start with plaintiff, get your comments on the instructions
14 that have been proposed and we may talk through some of those
15 and then defendant.

16 MS. LOURIE: Your Honor, we do not have any objection
17 to the instructions contained on pages two through 12.

18 THE COURT: By the way, let me just make one comment.
19 You'll notice sometimes I've got a question mark in
20 parentheses, that's just to remind me at the end of the trial
21 that the instruction is needed, that there was such evidence
22 presented. We'll address that after the evidence is in.

23 Okay. So going to page 13.

24 MS. LOURIE: On page 13, that charge, we do not have
25 any objection to the language of the charge. But we feel like

1 if you direct your attention to page 13 at the bottom where the
2 paragraph starts "In determining" and goes through the next
3 page to number six, all of that language is an explanation of
4 item 12 on your list of considerations for design defect on
5 page 15.

04:37:27

04:37:47

6 And then the following paragraph is an explanation
7 for 13 on the list which is compliance with standards. We feel
8 like it would make more sense to move those explanations to
9 below those numbers 12 and 13 so that it's clear what they go
10 with.

04:38:07

11 THE COURT: So taking "in determining" through six
12 and then "in determining," the next paragraph, and put them at
13 the end. Is that the thought?

14 MS. LOURIE: After number 13 of your list of
15 considerations.

04:38:22

16 THE COURT: And before that final paragraph?

17 MS. LOURIE: Yes, sir.

18 I see you nodding, Ms. Helm. Are you in agreement?

19 MS. HELM: Yes, Your Honor. That's actually how the
20 Georgia pattern charge reads so we are in agreement.

04:38:40

21 THE COURT: Okay. Let me make a note.

22 MS. LOURIE: And we actually submitted a charge
23 following that.

24 THE COURT: Okay. So then we would take that
25 language and put it in before the final paragraph on page 15;

04:38:52

1 right?

04:38:58

2 MS. LOURIE: Yes, sir.

3 THE COURT: Okay. We'll do that.

4 MS. LOURIE: The charge that starts on 16, failure to
5 warn, we would ask that you move the third paragraph that
6 starts with "the manufacturer of a medical device," which deals
7 with learned intermediary, to where learned intermediary is
8 discussed below which starts with "C.R. Bard" at the bottom of
9 the page.

04:39:12

10 THE COURT: So you would put it before that paragraph
11 at the bottom of the page?

04:39:41

12 MS. LOURIE: What do you think, Kate?

13 MR. STOLLER: Your Honor, we were going back and
14 forth on this ourselves whether it makes sense to put it in
15 front of the paragraph or after the second sentence of the next
16 paragraph which reads: C.R. Bard and BPV owe this duty to warn
17 to all physicians whom the manufacturers are to reasonably
18 foresee may use the product, which is where the physician is
19 introduced.

04:39:59

20 THE COURT: I'm happy to do it. I want to hear
21 defendants' views. Let me tell you will why I put it where I
22 did. The reason I did that was because when we start into the
23 actual instruction to recover damages for strict liability
24 because of an inadequate warning, she must establish -- and
25 we're telling them what Ms. Booker must establish in terms of

04:40:16

04:40:33

1 inadequate warning. It seemed to me important for the jury to
2 understand that means inadequate warning to the physician. I
3 thought that was an important context for them to have when
4 they are looking at the elements of proof and that's why I put
5 it up there.

04:40:36

04:40:51

6 If you think it's too disjointed there, we can move
7 it; but you had proposed it later but I moved it up just so
8 that when we're actually setting out the elements of proof,
9 they understand it's the warning that the physician we're
10 talking about, because that idea is not introduced earlier in
11 anyplace in the instructions I don't believe.

04:41:04

12 MR. STOLLER: The logic, Your Honor, is only to be
13 consistent with the other instruction in terms of the way it's
14 organized which is to introduce the charge or the claim that is
15 being made, a description of it, then the elements, and that is
16 a part of it. It's probably, you know, six of one, half a
17 dozen of the other. We felt it flowed better after the
18 elements.

04:41:33

19 THE COURT: What do defendants think?

20 MR. NORTH: I think the point that the Court raised
21 is an important one that should be left where it is.

04:41:48

22 THE COURT: Well, if it's six of one and half-dozen
23 of the other . . .

24 MR. STOLLER: Understood, Your Honor.

25 THE COURT: I think I'll leave it where it is just

04:42:04

1 because I really do want the jury to understand when they are
2 hearing or reading the elements, they know this is talking
3 about warnings to physicians.

4 MS. LOURIE: Okay. On page 17 of this charge where
5 it starts "The manufacturer's duty" under A and B, at the
6 beginning of the charge, you indicated that requests for
7 instruction number four, plaintiff's version was being given
8 but actually this paragraph is defendants' proposed
9 instruction.

10 Our proposed instruction had an additional sentence
11 that we ask be included at the end of that paragraph.

12 THE COURT: Is this the one about months, years
13 and --

14 MS. LOURIE: Yes, sir.

15 THE COURT: You're right. Thanks for catching that.
16 I did pull that out. There's only one reason I did. It's in
17 the cases you cited. I think it's in Georgia law. It's not in
18 the Georgia pattern jury instruction. That's the only reason I
19 pulled it out. I was trying to hue as closely as I could to
20 the pattern jury instructions although I departed from them in
21 a number of places as you've seen. That's the reason that
22 sentence came out and I'm happy to hear your thoughts on it.

23 MS. LOURIE: Okay. I understand, Your Honor, and our
24 thoughts are that the way it's worded, it could lead the jury
25 to believe that the duty to warn ends at the time of

1 implantation and in this case, obviously, the filter was in Ms.
2 Booker for seven years. That duty to warn her physicians,
3 including Dr. Amer who allegations have been leveled against in
4 this case, should -- the jury should understand that that duty
5 continues beyond implantation. And if we don't tell the jury
6 that, then they won't have any instruction in that regard and
7 they won't know that the duty continues. And Dr. Amer's
8 actions were two years after implantation.

9 THE COURT: Defendants, thoughts on that issue?

10 MR. NORTH: Your Honor, we think the pattern charge
11 as it is is not ambiguous. It talks about after the product
12 leaves the control of the manufacturer which would include the
13 time Dr. Amer assessed his study. We think we should stick
14 with the pattern charge as opposed to getting that specific as
15 they want to with the language.

16 THE COURT: Is your concern that in the second
17 sentence of that -- well, I guess I'm not able to articulate it
18 clearly. The second sentence says: It continues after a
19 product has left the control of the manufacturer to be sold or
20 distributed to the consumer.

21 Is your conclusion or your concern that that suggests
22 it goes from after it leaves until it gets into the hands of
23 the consumer?

24 MS. LOURIE: Yes, sir. That's exactly my concern
25 because the way it reads now, it says: To be sold or

1 distributed to the consumer. And that is the end of the
2 instruction. And that implies that that is the end of the duty
3 to warn.

4 So if you don't instruct the jury on the continuing
5 duty for weeks, months, years, they won't know that. That law
6 will not be before them; and as you stated, that is the correct
7 law in Georgia.

8 THE COURT: All right. Well, it seems to me there's
9 three ways we could address this. One would be to end that
10 sentence after the word "manufacturer" so that it says: As a
11 continuing duty to adequately warn of defects in the product
12 even after the product has left the control of the
13 manufacturer, period.

14 We could add language at the end of the sentence
15 which says something like: And, comma, in the case of medical
16 products, comma, after they have been implanted, period. Or a
17 third is we could add the weeks, months, and years sentence
18 that was proposed.

19 I'm interested in your thoughts on those three
20 options.

21 MS. LOURIE: I think the second one would be
22 preferable or the third over the first.

23 MR. NORTH: Not trying to be difficult but I like the
24 first alternative. I think it's simpler and avoids too much
25 comment.

1 THE COURT: Well, one of my concerns is not wanting 04:47:12
2 to comment on the evidence. If we ended the sentence after the
3 word "manufacturer," it's clear the instruction says the duty
4 continues after it leaves Bard's control. There will be no
5 argument from the defendants that it ended at some point. It 04:47:28
6 seems to me in closing you can emphasize the law says the duty
7 doesn't end when the filter leaves their hands. It continues
8 after. And you can make your point with full force and not --
9 there won't be any risk. The instruction is going to limit the
10 jury. 04:47:46

11 Do you see it differently as how it will play out in
12 closings? I know you like the other instruction better but I
13 want to make sure you're not seeing some ambiguity in that
14 course.

15 MR. STOLLER: I think there's a difference, Your 04:47:59
16 Honor, between an argument about the facts as they apply to the
17 law and the law and I think the law is that the duty continues
18 even after implant. And I think there's a difference in
19 arguing to the jury that that duty continues even after it's
20 implanted, as a matter of law, versus saying the duty continues 04:48:12
21 without a real end for the jury to understand.

22 And then they had -- I'm not going to be doing the
23 closing in this case but then for me to say it's a different
24 thing to say, "You're going to be instructed by the Judge that
25 the law requires that duty even after it's been implanted," 04:48:31

1 which is, in fact, the law and me saying the law says it 04:48:34
2 continues after they release it, and you should infer that
3 means even after it's been implanted. But it is particularly
4 an issue with a medical device because I think unlike me buying
5 something off the shelves there's that -- there's the learned 04:48:49
6 intermediary that you are instructing them on that the doctor
7 is the one who is buying, the doctor is the one they have to
8 warn and there is sort of a break in that continuity between
9 the manufacturer and the ultimate person who is implanted with
10 the product. 04:49:05

11 So I think it's more appropriate, Your Honor, to add
12 that language and your second suggestion than to cut off the
13 language.

14 THE COURT: Mr. North?

15 MR. NORTH: Your Honor, with respect to Mr. Stoller, 04:49:14
16 I don't think that is necessarily the law in Georgia. I think
17 that is undecided. The Georgia continuing duty to warn cases
18 have generally dealt with motor vehicles and consumer products.
19 I am not aware of a single one that has addressed the
20 continuing duty to warn in the context of a medical implant and 04:49:33
21 whether it would continue after implant.

22 I think there's an argument to be made that that
23 should be treated differently than a consumer product; and if I
24 was in front of the Georgia Court of Appeals, I might be trying
25 that. But I think we're safer in this right after 04:49:48

1 "manufacturer" since the application of the continuing duty to 04:49:51
2 warn has not been spelled out for medical products in the past
3 to my knowledge.

4 THE COURT: All right. I understand both sides'
5 arguments. I'll think about this. I want to give this some 04:50:03
6 more thought.

7 MS. LOURIE: Okay. Finally in this charge, Your
8 Honor, at the end of the paragraph just beyond that one, our
9 charge had a sentence that stated at the very end of that
10 paragraph: A warning is inadequate if it does not provide a 04:50:22
11 complete disclosure of both the existence of the risk and the
12 extent of the danger and the severity of any potential injury
13 involved.

14 We would ask that that language be put back into the
15 end of this paragraph. I think it's important to our facts of 04:50:40
16 the case in that the G2 filter -- IFU, excuse me, did not warn
17 about the extent of injury that could take place here.

18 THE COURT: Let me -- I'm going to step out for just
19 a second and grab my notes that I left on my desk about that
20 sentence. I'll be right back. 04:51:08

21 Which instruction or proposed instruction was that
22 in?

23 MS. LOURIE: It was in plaintiff's request to charge
24 number four.

25 THE COURT: Okay. Just a second. 04:51:47

1 The note that I made when I crossed out that sentence 04:52:22
2 was "too much of a comment on the evidence." It just seemed to
3 me to be so close to the evidence that it would sound to the
4 jury like I was commenting on the evidence. I'm interested in
5 your thoughts on that. And I am sorry but I am forgetting your 04:52:42
6 name.

7 MS. LOURIE: Robin Lourie. Ms. Lourie.

8 THE COURT: Lourie. Okay. Ms. Lourie, go ahead.

9 MS. LOURIE: Well, I don't see that it's really a
10 comment on the evidence to explain to them that there's a duty 04:52:58
11 that exists to warn of the extent of the severity of the injury
12 that could potentially occur. I mean, that's a part of the
13 warning that should be given by a manufacturer of any product,
14 especially a medical device.

15 THE COURT: Okay. 04:53:22

16 Defendants?

17 MR. NORTH: Your Honor, we do believe that's a
18 comment on the evidence. Georgia law and the pattern charge is
19 that the warning must be adequate. I think it's certainly up
20 to them to argue that to adequately apprise a doctor, they 04:53:31
21 need -- the warning should talk about both the extent and the
22 severity. But, again, I think that's more appropriate for
23 arguments and, in a charge like this, would be commenting on
24 the evidence and it's not part of the pattern charge.

25 THE COURT: Let me ask whether defendants are going 04:53:57

1 to be recommending changes on page 17 other than the issue I'm
2 addressing in the italics on the bottom.

3 MR. NORTH: Only with regard to our request number
4 four, Your Honor, that's mentioned at the end.

5 THE COURT: Okay.

6 All right. On this issue I'm going to go with my
7 initial instinct. I think that is too much of a comment or
8 could be perceived as a comment on the evidence by me. The
9 sentence that is in that paragraph says: You must decide
10 whether adequate efforts were made by C.R. Bard and BPV to
11 communicate all risks that were known or reasonably should have
12 been known. I think that's broad as it should be and gives the
13 plaintiffs ample room to make the arguments and for the jury to
14 recognize that Bard had a duty to warn of risk, so I'm not
15 going to include that final sentence that was in request to
16 charge number four.

17 MS. LOURIE: Okay. The only other comment we have is
18 I think there's just a typographical issue on page 16 under
19 paragraph -- not paragraph, line item C. I think that the
20 word -- the third "the" doesn't really belong in that sentence.

21 THE COURT: Tell me again where we are on page 16.

22 MS. LOURIE: C, subparagraph C.

23 THE COURT: Where it says "the inadequate warning"?

24 MS. LOURIE: Yes, sir, "was the proximate cause
25 of" -- we need to take the out.

1 THE COURT: I see. We'll take that out. 04:56:01

2 MR. STOLLER: Actually, Your Honor, that same issue
3 appears in the design defect one as well under the same
4 element, C. You'll find it there and, unfortunately, it
5 carries through on the reordered proposed charge we gave you. 04:56:14

6 THE COURT: Okay. So that's on page 13; right?

7 MR. STOLLER: Yes, sir.

8 THE COURT: Okay. We'll fix that.

9 I'll tell you that, before we go on with plaintiffs,
10 because it's going to help me to think about these altogether, 04:56:27
11 let's cover the ground with defendants that we've already
12 covered.

13 Did you have comments, defense counsel, on the strict
14 liability design defect instruction? We've already talked
15 about moving paragraphs but did you have other comments? 04:56:43

16 MR. NORTH: No, Your Honor, we did not.

17 THE COURT: Okay.

18 And what then are your comments on the strict
19 liability, failure to warn?

20 MR. NORTH: The comments on the strict liability, 04:56:57
21 failure to warn, Your Honor, are, we believe the evidence would
22 support our -- I'm sorry, I'm having trouble with all of these
23 numbers. Number four, which is the failure to read the
24 warning, we believe that that -- that the Court left open the
25 possibility depending on the evidence and said that the parties 04:57:25

1 were disputing. As we understood Dr. D'Ayala's testimony, he 04:57:28
2 said that the IFU was, quote, available, unquote. But he never
3 said he read the IFU. And we believe that is, of course, the
4 plaintiff's burden to show not only a failure to warn but that
5 the failure to warn caused the incident or the injury. 04:57:50

6 And I don't think it meets their burden necessarily
7 and we should be able to argue they haven't met that burden
8 because they -- the testimony is only that it was available to
9 him. The other testimony was that he did not recall whether he
10 had any discussions with Mr. Ferrara about filters and 04:58:07
11 complications. So we just believe that evidence is adjusted or
12 does warrant the charge that we recommended which is just one
13 sentence in our proposed number four.

14 THE COURT: All right. I'm trying to find it. What
15 page was it on in your submissions? 04:58:32

16 MR. NORTH: The one that is on page 108, the proposed
17 charge --

18 THE COURT: That's probably why I'm not finding it.

19 MR. NORTH: -- of the original submission.

20 THE COURT: Yes. I must have put it under the 04:58:45
21 negligent failure to warn. Hold on just a minute.

22 Mr. North, let me ask you a question on this. This
23 instruction, it seems to me, would tell the jury that they
24 should rule in your favor on the failure to warn claim if
25 Dr. D'Ayala did not read the IFU even if the jury finds that 04:59:38

1 Bard should have and did not send a dear doctor letter or
2 advise its sales force or take some other action to notify
3 Dr. D'Ayala. Wouldn't that be the effect of this instruction?

04:59:48

4 MR. NORTH: I think -- Your Honor, I had not thought
5 of that in that way. I think you are correct but I think the
6 instruction, if I could be given the opportunity, could be
7 reworded to sort of not directing it only in that circumstance
8 because it is an important point to emphasize or to demonstrate
9 that there must be a causal link with the warning and I think
10 that the jury could be instructed that that is one factor to
11 consider in determining whether a failure to warn was the
12 causation here or cause.

05:00:10

05:00:30

13 THE COURT: Well, you said there needs to be a causal
14 link with the warning. I think there needs to be a causal link
15 with the failure.

05:00:45

16 MR. NORTH: Right. Either way. The warning or the
17 failure. Either an inadequacy in the warning that was given or
18 a failure to give some additional warning.

19 THE COURT: And if the failure they find is that Bard
20 failed to reach out and alert doctors to something that they
21 knew was an increased risk, how can you say Bard's not liable
22 if the doctor didn't hear it when Bard failed to speak it?
23 That's the probable I'm having.

05:00:57

24 MR. NORTH: I understand. I'm sorry I'm not being
25 clear. I did concede that point. But I also think it's

05:01:18

1 important that they see that if they don't read the IFU, if the 05:01:21
2 doctor didn't, that is a factor to consider in the causal link
3 of that aspect of the alleged failure to warn.

4 THE COURT: So you're saying it that should be
5 rephrased as something they should consider? 05:01:33

6 MR. NORTH: Yes.

7 THE COURT: Not as a defense?

8 MR. NORTH: Right.

9 THE COURT: Ms. Helm wants to get your attention.

10 MR. NORTH: On page 108 -- 05:01:56

11 THE COURT: Just one second.

12 Go ahead.

13 MR. NORTH: We could it something -- and I could do
14 this overnight and have it for the Court tomorrow or something
15 as a proposal. The parenthetical to the *Camden* case which is 05:02:22
16 listed at 108, says: Where a plaintiff does not read an
17 allegedly inadequate warning, the adequacy of that warning's
18 contents cannot be a proximate cause of the plaintiff's
19 injuries. I think that could be adapted, something like that,
20 which is what we would propose and I could have that for the 05:02:41
21 Court to look at tomorrow morning.

22 THE COURT: Well, Ms. Lourie, I know you want to make
23 a comment. I'm not inclined to do it but I'll be happy to look
24 at language if you will want to propose it and then I'll give
25 plaintiff a chance to comment. 05:03:00

1 But I've expressed my concern. I just have trouble
2 thinking of how you say that to the jury without suggesting
3 that the doctor should have been hearing something that wasn't
4 spoken.

05:03:02

5 Okay. So but you want to submit it, I'll look at it
6 and give plaintiff an opportunity to comment.

05:03:17

7 MR. NORTH: Okay.

8 THE COURT: So that was all you had on strict
9 liability, failure to warn?

10 MR. NORTH: Right.

05:03:28

11 THE COURT: Okay. Let's go back to plaintiff's
12 counsel, then, on negligent design defect. Let me pause for a
13 minute and ask a question of you all. When I put these
14 together, I separated out Bard and BPV. You had not done that
15 in your instructions. You had just called it Bard. I broke
16 them out here and we did it in the verdict form as well.

05:03:48

17 Do you agree we should be doing that? We have two
18 defendants but are you of the view we don't need to do that
19 when talking to the jury or preparing a verdict form?

20 MS. LOURIE: I don't feel like it's necessary, Your
21 Honor, because I don't think the jury is going to understand
22 the difference in the two entities and I think it's going to be
23 confusing.

05:04:07

24 MR. NORTH: Your Honor, I don't think so,
25 particularly since Bard is -- I mean, BPV is a wholly owned

05:04:23

1 subsidiary of Bard and there's not going to be a situation
2 where if you had a verdict against one but not the other it
3 would make any difference.

4 THE COURT: Well, maybe what we ought to do, then, is
5 throughout the instructions -- say early on where I already
6 said that there's two defendants in the case but then say they
7 will be referred to collectively as defendants in this
8 instruction. And then all the rest of the way through where
9 I've broken out Bard and BPV just put in "defendants" and
10 simplify the verdict form in the same way. Does that sound all
11 right to both sides? 05:04:29 05:04:41 05:04:58

12 MS. LOURIE: This sounds a little petty, I think, but
13 I would prefer to use "Bard" rather than "the defendants" if
14 we're going to keep using other people's names like Ms. Booker
15 and Dr. Amer and Dr. Kang, because then it might not be clear
16 to the jury who we're talking about. 05:05:18

17 THE COURT: Well, I could say "collectively referred
18 to as Bard" and then just use "Bard" through the rest. Is that
19 all right?

20 MR. NORTH: That's fine Your Honor. 05:05:37

21 THE COURT: Okay. Now, negligence.

22 MS. LOURIE: Yes, Your Honor, we do not have any
23 problem with the negligence design defect charge.

24 THE COURT: Okay. How about from the defendants'
25 point of view? This is page 18 of the proposed instructions. 05:05:49

1 MR. NORTH: No, nothing, Your Honor. 05:05:56

2 THE COURT: Okay. How about negligent failure to
3 warn from the plaintiff's side?

4 MS. LOURIE: No, sir, no objection.

5 THE COURT: And from the defendant? 05:06:10

6 MR. NORTH: Nothing, Your Honor, other than to note
7 the typo in the title Failure to Ward.

8 THE COURT: Where is that?

9 MR. NORTH: Where it says stipulated request to
10 charge number three. You may be taking that out. 05:06:23

11 THE COURT: Oh, yeah. By the way, I'm going to take
12 out all of these titles. The version the jury gets will be
13 Instruction 1, Instruction 2, Instruction 3. I just left this
14 in so we could track what we were talking about but good
15 proofreading. 05:06:37

16 All right. Let's just keep working our way through
17 them. So plaintiff, comparative fault.

18 MS. LOURIE: Yes, sir. On number three of page 20 we
19 just have the same problem with the word "the."

20 THE COURT: Okay. Good catch. 05:06:53

21 MS. LOURIE: And then on the second page, page 21, if
22 you'll look at paragraph D, this language from a Georgia
23 pattern charge and it's -- the first sentence of the charge is
24 improper. It's not tracking the Georgia charge and the problem
25 with it is that it's phrased in terms of alleged negligence was 05:07:24

1 the proximate cause and requiring expert testimony for that. 05:07:30

2 But, in fact, what the charge is supposed to require is a
3 showing of -- that you have expert testimony as to the
4 negligence and the proximate cause -- or that negligence is the
5 proximate cause. So there's two elements that require expert 05:07:49
6 testimony.

7 And the way that this is worded makes it sound like
8 there's only a requirement to show proximate cause by expert
9 testimony.

10 THE COURT: So how would you reword it? 05:08:03

11 MS. LOURIE: And I think, if I'm not mistaken, that
12 defense agree to this stipulated charge.

13 MR. NORTH: No. That's a problem we need to discuss.

14 MS. LOURIE: Okay. In order for Bard to show that --

15 THE COURT: What page are you reading from? 05:08:23

16 MS. LOURIE: This is stipulated request to charge
17 number one.

18 THE COURT: Okay. Give me just a second to find
19 that.

20 MR. NORTH: Number what? 05:08:32

21 MS. LOURIE: One.

22 THE COURT: Okay. I've got it.

23 MS. LOURIE: In order for Bard to show that Dr. Amer,
24 a non-party, was negligent and that his negligence was one of
25 the proximate causes of Ms. Booker's injury, Bard must present 05:08:53

1 expert testimony.

05:08:57

2 THE COURT: Okay. I see the distinction.

3 Defendants?

4 MR. NORTH: I'm sorry, Your Honor. I am totally
5 lost.

05:09:06

6 THE COURT: Page 42 of the submission, first sentence
7 compared to the first sentence in paragraph D.

8 MR. NORTH: Okay. That part. Yes. No problem with
9 that.

10 THE COURT: Okay. So you are all right with their
11 proposed change?

05:09:18

12 MR. NORTH: Right.

13 THE COURT: Okay. So everybody look at page 21.
14 What we will say in paragraph D is: In order to show that
15 Dr. Amer or Amer was negligent, comma, and that his negligence
16 was the proximate cause of Ms. Booker's injury, comma, Bard
17 must present expert testimony.

05:09:34

18 Does that work?

19 MS. LOURIE: Yes, sir.

20 MR. NORTH: Yes. I'm sorry, Your Honor.

05:10:11

21 THE COURT: Okay. All right.

22 Ms. Lourie, anything else on comparative fault?

23 MS. LOURIE: No, sir.

24 MR. NORTH: Here is a source of confusion here, Your
25 Honor. At the top of that charge, the Court correctly notes

05:10:25

1 that it includes stipulated request to charge number six. But
2 stipulated request to charge number six was part of the
3 plaintiff's charges and was not so stipulated. I don't know
4 how that word got there and we missed it because at the very
5 end of it on number six, which page six in the original
6 submission, we have our objection to that portion of the
7 charge.

05:10:29

8 So it was not stipulated and I apologize we did not
9 catch that they had typed "stipulated" there because we do have
10 our objection.

05:10:43

05:11:01

11 THE COURT: I read your objection.

12 MR. NORTH: What?

13 THE COURT: I read your objection and then I tried to
14 do the modifying you said hadn't happened. Maybe I messed up
15 on that. But show me in the proposed instruction what you're
16 concerned about.

05:11:14

17 MR. NORTH: Your Honor, I apologize, I did not catch
18 that the change had been made, the part I was concerned about.
19 I see what you've done. It's fine now.

20 THE COURT: Okay.

05:11:43

21 All right. How about intervening cause? Plaintiff?

22 MS. LOURIE: Yes, sir. This charge instructs the
23 jury in several places that Dr. Kang's action can be an
24 intervening cause of all or part of Ms. Booker's injury.
25 Respectfully, that's not the law in the state of Georgia. I

05:12:16

1 think what has happened is that the principles of apportionment 05:12:18
2 and intervening cause have been intertwined.

3 THE COURT: Well, can I interrupt you so that you can
4 address my specific thinking?

5 MS. LOURIE: Yes, sir. 05:12:33

6 THE COURT: I thought about this issue and I put in
7 "all or part" intentionally to prompt just this discussion. We
8 looked and we could not find any case in Georgia or federal
9 court applying Georgia law that talked about part or
10 disapproved of part and we actually kicked around hypotheticals 05:12:52
11 about where you can -- well, this case is a good one. Clearly,
12 even if Dr. Kang were the intervening cause of everything that
13 happened after his attempt to intervene, there would still be
14 some harm to Ms. Booker before he intervened presumably in the
15 form of pain and discomfort and things like that. 05:13:16

16 So I know that every case that's decided that talks
17 about an complete intervening cause; but I couldn't think of a
18 reason, based on the cases we read, that the doctrine wouldn't
19 apply in a fact situation where there's some injury that occurs
20 before the intervening cause rises. 05:13:37

21 So that was the thinking. And I'm happy to hear your
22 thoughts on what's wrong with that.

23 MS. LOURIE: Well, what I think that this charge ends
24 up doing is apportioning and Dr. Kang has not been listed as a
25 non-party at fault for purposes of apportionment in this case. 05:13:54

1 And intervening cause is something that only deals 05:13:59
2 with proximate cause. It breaks the chain of causation. It's
3 an all-or-nothing proposition. Either Dr. Kang's action broke
4 the chain and Bard is not responsible at all for any of the
5 resulting injury or it didn't break the chain. 05:14:17

6 And I think that, you know, the Court laying out the
7 three prongs that are set forth in *Zaldivar*, the Supreme Court
8 case of Georgia, I think that's why the standard is so
9 stringent. You have to meet all three prongs to show an
10 intervening cause, an intervening act breaks the chain. And I 05:14:37
11 just don't feel like this is proper, a proper statement of
12 Georgia law.

13 THE COURT: Well, you are right that the effect of
14 this would be the same as if they apportion fault. We talked
15 about that as well. And, in fact, as you saw in the -- I guess 05:14:57
16 it was in a motion *in limine*, we wrestled with the question
17 whether intervening cause is a separate doctrine under Georgia
18 law from the comparative fault statute and we concluded it was
19 because of the way the statute was that written and the way the
20 cases have dealt with it. 05:15:15

21 The specific hypothetical we came up with was
22 somebody is crossing the street and the defendant hits him,
23 injures him. They get knocked to the ground. A Good Samaritan
24 then drags them off of the road and lays him down on an
25 electrical wire that severely burns their back. Now, there's 05:15:31

1 an intervening cause there. Would you be able to argue under
2 Georgia law that even though any injury that could occur to a
3 person, once you've knocked them to the ground and they can't
4 move, would be proximate cause by the accident, in this case
5 the Good Samaritan was an intervenor who would break the chain
6 by dragging the person into a dangerous place?

05:15:37

05:15:53

7 Anyway, there were others we kicked around, too. And
8 we recognize there's no difference in the outcome than if that
9 individual gets named as a non-party at fault, the Good
10 Samaritan, and the jury apportions the burn damages to that
11 person. But we couldn't see anything in the intervening cause
12 case law that would disprove the notion that there's a break in
13 the proximate cause by the Good Samaritan.

05:16:12

14 So that's our thinking.

15 MS. LOURIE: I understand the concern. It is a
16 confusing interaction between the two items. But here's one
17 difference: If you allow the jury to apportion, which is
18 basically what the verdict form is doing now, as to Dr. Kang,
19 and you tell the jury that they don't even have to show
20 wrongful acts or negligence, then they are permitted to
21 basically put an apportionment argument on Dr. Kang without
22 proving negligence or without giving us notice that they are
23 going to try to do that. And we haven't presented any evidence
24 to --

05:16:32

05:16:53

25 THE COURT: Well, you are absolutely right about

05:17:15

1 that. But I assume you agree that under Georgia law, the jury
2 could apportion 100 percent of the fault to Dr. Kang under any
3 intervening cause law without finding him negligent, because
4 Georgia law says you don't have to.

5 MS. LOURIE: No. They can't apportion fault. They
6 can break the chain on causation.

7 THE COURT: But that's the same effect as
8 apportioning 100 percent of the fault to him; right?

9 MS. LOURIE: Not really, Your Honor, because we
10 haven't been given notice that he's a non-party at fault. If
11 they wanted to do that, they should have listed him as a
12 non-party at fault back at that time.

13 THE COURT: You seem to be arguing that a party can't
14 assert intervening causes as a defense unless they have named
15 that individual as a non-party at fault.

16 MS. LOURIE: No, sir. I'm not asserting that at all.
17 I'm asserting that there are two different principles of law.

18 THE COURT: I agree they are. But isn't the
19 effect -- if the jury can determine that somebody who is not in
20 the non-party at fault notice is an intervening cause, the jury
21 can effectively apportion 100 percent of the liability to that
22 person under Georgia law.

23 MS. LOURIE: I think the problem is the use of the
24 word "apportion." They can break the chain, the causal chain,
25 which is an element of proving the case. And once that chain

1 is broken, it let's Bard off the hook. That's the difference.

05:18:35

2 THE COURT: Well, let me try one more just to make
3 sure I'm understanding. What is the difference between a jury
4 saying the causal chain is broken as to this intervening cause,
5 Bard is not liable, versus looking at the two and saying the
6 doctor is 100 percent liable and a jury looking at the same
7 case and saying Dr. Kang broke the causal chain after 50
8 percent of the harm had been incurred, which would be the same
9 as apportioning him 50 percent? I don't see a difference
10 between those two actions. Granted they come about from these
11 two different doctrines but they are both the application of
12 the different doctrine to the same case.

05:18:53

05:19:16

13 MS. LOURIE: I agree with you that the bottom-line
14 result might be the same, that the plaintiff might not recover,
15 but the law, as set forth in the state of Georgia, is that you
16 want to apportion fault, you go by the statutory requirements
17 and they have not done that with Dr. Kang.

05:19:30

18 And can I talk about the *Coleman* case that you cited?

19 THE COURT: Sure. Yes.

20 MS. LOURIE: Okay. So the *Coleman* case involved
21 doctor number one that commits malpractice. He -- because of
22 what he does, injects the plaintiff with a hormone, she doesn't
23 know she's pregnant, so she finds out that she is pregnant.
24 She has to have -- she has to terminate the pregnancy. So she
25 goes for termination of the pregnancy. The termination was not

05:19:48

05:20:09

1 done properly. She develops an infection in her pelvis and she 05:20:14
2 then -- the doctor number two that did not perform the
3 termination correctly, he didn't tell the plaintiff. He knew
4 that she was still pregnant but he didn't tell her.

5 So after she developed the infection, she goes back 05:20:36
6 to the doctor and has a termination of the pregnancy by doctor
7 number three. So we have three doctors involved now.

8 As a result of the second procedure and the
9 infection, she developed clotting. The clot broke off in the
10 third operation causing her to have a stroke and causing her 05:21:00
11 severe injury.

12 At trial she sued doctor number one and doctor number
13 two and got a verdict against both of them. The judge entered
14 a JNOV for doctor number one because he found that the actions
15 of doctor number one were too remote and that doctor number 05:21:24
16 two's actions were what caused all the problems, okay?

17 On appeal the Court said that the Court of Appeals
18 said, no, doctor number one started a chain of events. He
19 committed malpractice. Even though doctor number two comes in
20 and commits a completely different and distinct act of 05:21:49
21 malpractice, doctor number one is liable for all damages
22 resulting from his original starting the chain of events.

23 The Court held the defendant may be liable not only
24 for damages resulting directly from his negligent act but also
25 for all damage resulting from the improper or unskillful 05:22:11

1 treatment of the injuries by the physician.

05:22:15

2 And they found that doctor number one was responsible
3 for all of the injuries.

4 So in your scenario, I guess we could argue that
5 doctor number one forcing her to have to endure a termination
6 of her pregnancy, she was injured by that and she had a
7 distinct injury under your scenario where she had to undergo
8 the procedure again, wasn't told that she -- sorry. I got
9 mixed up. Okay. She would be injured by doctor number one for
10 having to undergo a termination. She was injured by doctor
11 number two by developing the infection and him not telling her
12 that she was still pregnant. So the Court held number one
13 responsible for the whole thing.

05:22:30

05:22:54

14 THE COURT: Did the Court address intervening cause?

15 MS. LOURIE: Yes, sir.

05:23:17

16 THE COURT: And what did it say on this issue we're
17 wrestling with?

18 I read *Coleman* and I'll be happy to go read it again.
19 But what I don't think *Coleman* said is that you can't use
20 intervening cause for doctor number two.

05:23:39

21 MS. LOURIE: No. You can use intervening cause,
22 absolutely.

23 THE COURT: Well, you can't use intervening cause to
24 just break the chain for the harm caused after doctor number
25 two. I don't think *Coleman* said that. In other words, I don't

05:23:57

1 remember *Coleman* in any detail. But when we looked at that and 05:24:02
2 other cases, I couldn't find any Georgia law -- we might have
3 missed it -- that said intervening cause has to be an
4 all-or-nothing proposition. It can never be for part of the
5 injury. That's what we couldn't find. And logically, it seems 05:24:18
6 to me, it could. Granted that gets you to the same place as
7 the statute, but I already found that these are sort of
8 independent doctrines under Georgia law.

9 But I'll be happy to go read *Coleman* again.

10 MS. LOURIE: Well, then in essence you're allowing 05:24:39
11 them to apportion fault to --

12 THE COURT: I completely agree and the reason that
13 happens is because when the Georgia legislature passed the
14 comparative fault statute, it wrote it narrowly. And it didn't
15 abrogate intervening cause which was a common law doctrine and 05:24:52
16 which remains in existence under Georgia law. So you've got
17 two currently viable doctrines in Georgia, comparative fault
18 and intervening cause, and the legislature didn't eliminate the
19 second. So it seems to me that I've got to apply them both.

20 MS. LOURIE: But, Your Honor, the converse is also 05:25:14
21 true. If you haven't found a case that says you can do it this
22 way, you -- you haven't found a case that supports the way
23 you're doing it I don't think. Isn't that what you said?

24 THE COURT: You're right, I haven't, but what I have
25 found is that intervening cause is alive and well in Georgia. 05:25:29

1 And it seems to me there can be cases where the intervening
2 cause intervenes after some harm has occurred and it wouldn't
3 make sense to say that doctrine doesn't apply in those cases
4 just because the intervening cause came after some harm
5 occurred.

6 MR. STOLLER: Your Honor, in those occasions, isn't
7 it cutting off the harm? I'll give you an example: If we're
8 in a car accident and I break your hand as a result of that and
9 you're in the healing process, in order to stop my liability
10 for it, there has to be an event that cuts off all of my
11 causation to that arm, something that comes in and aggravates
12 it, is an aggravation injury. I still have responsibility
13 there. It has to be so severe as to cut it off such as you're
14 out in the yard and your neighbor is whacking their hedges with
15 the hedge whacker and they cut your hand off.

16 THE COURT: Okay. Let's say that happens. Could
17 that be an intervening cause?

18 MR. STOLLER: I think you could argue it's an
19 intervening cause and it's a new injury. But I'm still
20 responsible --

21 THE COURT: But -- but at that point, can't I sue for
22 all the pain I suffered before my hand got caught off?

23 MR. STOLLER: Yes.

24 THE COURT: That's what I'm saying.

25 MR. STOLLER: But there's no apportionment there.

1 There's no apportionment.

05:26:52

2 THE COURT: But the only thing I can recover from you
3 is the pain I suffered up until the time my neighbor cut my
4 hand off. I can't sue you for that because you didn't cause
5 that.

05:27:01

6 MR. STOLLER: I think we're in agreement with that
7 but it's a different injury at that point. See, the problem is
8 the words -- there are two problems. One is -- and this is not
9 something we've talked about yet but which is that we think
10 there needs to be some expert testimony established that
11 proximate causation here, particularly when you're talking
12 about medical issue. But the second -- the second point, which
13 is the debate we're engaged in right here, is, those are two
14 distinct injuries. That's the proximate cause here that we're
15 talking about. It is not a part of the injury. You now have a
16 new injury that cuts it off entirely.

05:27:14

05:27:30

17 THE COURT: So what if the jury in this case says we
18 think the tear in the tricuspid valve is a new injury?

19 MR. STOLLER: Then they can't award us for damages
20 for this injury.

05:27:45

21 THE COURT: That's exactly what I'm saying.

22 MR. STOLLER: But that is a distinct injury. It's
23 not a part of.

24 THE COURT: It is because of an intervening cause.

25 MR. STOLLER: But I'm not disagreeing with you on

05:27:54

1 that. My point is that the language is -- when you talk about 05:27:56
2 "a part of" requires a portion. They then need to stop and say
3 that Bard is responsible up to this point for the injury and
4 that is it. They are not supposed to calculate damages beyond
5 that and then start parsing it out. 05:28:09

6 THE COURT: We can work on the wording -- we can work
7 on the wording, but I think you're agreeing with my notion that
8 there can be an intervening cause after the initial injury and
9 the original defendant isn't responsible for the damages caused
10 by that intervening cause. 05:28:24

11 Mr. O'Connor, I don't know if we'll triple team this
12 but the other concern I have is that -- hold on, we're at 5:28.
13 Do this is in about 60 seconds just because --

14 MR. O'CONNOR: The only testimony, the only evidence
15 they heard and they heard from a medical doctor. They have 05:28:41
16 nobody to talk about that. This is an issue that a trier of
17 fact cannot decide without expert testimony. The only evidence
18 that is before this jury right now came from Dr. Harvey and
19 Dr. Kang that what happened in that procedure was an
20 unavoidable consequence which never cuts off -- 05:28:58

21 THE COURT: We haven't heard all the evidence yet.

22 MR. O'CONNOR: Well, I don't think they have listed
23 an expert.

24 THE COURT: Well, you can make that argument. If you
25 don't think evidence supports a separation, that's a separate 05:29:09

1 basis for taking that out, but I have got to hear their
2 evidence before I can rule on that point.

3 My concern is we're at 5:30. Elaine has been going
4 all afternoon. We've got some ground to cover. I understand
5 the plaintiff's position on this. I want to think about it
6 more and read *Coleman*. I know what the defendants are going to
7 say, which is I'm thinking brilliantly. But this is a tough
8 issue that we've wrestled with before and I want to spend more
9 time on it. But let's pause for a minute and see where we are
10 on the overall instructions because we can't go for another
11 half-hour.

12 MR. STOLLER: Your Honor, we've given to you and the
13 other side a redraft of this instruction as well.

14 THE COURT: That makes it all or nothing I assume. I
15 haven't read it.

16 MR. STOLLER: It takes out "the part." As we said,
17 "the part" is an issue.

18 THE COURT: Right.

19 Ms. Lourie, did you have other different issues you
20 wanted to raise on intervening cause? I assume I can get
21 everything from your proposed instruction.

22 MS. LOURIE: We do. We took care of them in our
23 proposed instruction. It's all interrelated. We didn't think
24 that the -- one of the paragraphs was worded such that the jury
25 could understand it.

1 THE COURT: Well, let's do this is on this issue. We 05:30:34
2 clearly have got to revisit this again. What I will do in the
3 meantime is read *Coleman*. I'll look at your proposal. I'll
4 give you my thoughts after that, either in the form of a
5 revised instruction, and we'll find a time next week to talk 05:30:49
6 about it before we charge the jury.

7 Traci, would you look, by the way, and see Monday,
8 Tuesday and Wednesday if we've got 4:30 hearings every day.

9 So we'll come back to it after I've had a chance to
10 read *Coleman* and look at your proposal. 05:31:04

11 MR. NORTH: Your Honor, I'm very sorry to do this
12 because I know we're in a hurry but going back just one to
13 comparative fault of Dr. Amer, there was one objection that I
14 had that wasn't addressed and I think it's because they
15 submitted two different charges. 05:31:17

16 THE COURT: Just tell me what it is.

17 MR. NORTH: It's in D, where it says: In order to
18 show that Dr. Amer's alleged negligence was the proximate
19 cause. I believe that should be "one of the proximate causes.
20 That's how their original stipulated thing read. It should be 05:31:32
21 "one of the proximate causes."

22 MR. STOLLER: I'm sorry. I was trying to understand.

23 THE COURT: The first sentence in D. It seems to me
24 that's right. If you've got comparative fault, both people are
25 proximate causes. 05:31:50

1 MR. STOLLER: I'm sorry, Your Honor.

05:31:53

2 THE COURT: We could say "a proximate cause" or "one
3 of the proximate causes" but I believe that's clearly right on
4 the law.

5 Do you disagree with that?

05:32:00

6 MS. LOURIE: No, sir.

7 MR. STOLLER: I think the language from the
8 instruction, the pattern instruction, is "a proximate cause."
9 Is that right?

10 THE COURT: All right. We'll look at that.

05:32:10

11 Okay. So let's -- give me a sense for what else
12 you've got issues on that we need to talk about so we can
13 figure out when we're going to do this. I mean, for example,
14 are you going to have issues on assumption of the risk on
15 damages?

05:32:30

16 MS. LOURIE: We have an issue with one line that was
17 left out of assumption of the risk. The first damages charge
18 we're fine with. The punitive damages phase one charge, we
19 have one sentence that was taken out of the pattern charge.

20 THE COURT: Okay. Tell me what line was taken out of
21 assumption of the risk that you're concerned about.

05:32:50

22 MS. LOURIE: If you look in the first paragraph at
23 the end where it says product, comma, the third sentence down.

24 THE COURT: Right.

25 MR. STOLLER: Do you want me to read it? Your Honor,

05:33:08

1 the pattern instruction after the word "product" and comma in
2 line three says: Taking a risk which, in and of itself,
3 amounts to a failure to exercise ordinary care for her safety.

4 THE COURT: Okay. What we're going to do is look at
5 that on the pattern instruction and I'll give reaction and give
6 defendant an opportunity to comment after we've looked at that.
7 So we will look at the pattern instruction additionally.

8 I'm afraid we're just going to have to flag issues
9 for me to look at because we're so short on time.

10 Was there on assumption of risk that the defendants
11 wanted me to look at?

12 MR. NORTH: Anything on our list, Your Honor -- I'm
13 sorry. No.

14 THE COURT: Okay.

15 Ms. Lourie? Where were you on damages?

16 MS. LOURIE: We're fine with the first damages on 24
17 and 25.

18 THE COURT: How about defendants, 24 and 25?

19 MR. NORTH: On 25 we just had a comment about the
20 language, the last paragraph, whatever condition they find her
21 language, we don't think that's adjusted to the evidence here.
22 There's no real issue about that.

23 THE COURT: Are you saying that paragraph should come
24 out?

25 MR. NORTH: Right, because I don't think we're making

1 any argument that there's something about her preexisting
2 injuries that should affect the amount of damages she can
3 recover here.

4 THE COURT: Well, are you saying that there was
5 nothing about her preexisting condition that exacerbated the
6 harm caused by the filter. Is that your concern? I mean, she
7 had lots of preexisting conditions.

8 MR. NORTH: But the injury that she's suing us for,
9 the migration of the strut to her heart, I don't see how her
10 preexisting -- I mean, the preexisting conditions clearly
11 necessitated the implant of the filter but not particular
12 injuries.

13 THE COURT: Okay. Let me get plaintiff's comment.

14 MS. LOURIE: Well, they spent a lot of time today
15 going into her preexisting conditions and if they are not going
16 to get up there and argue that her chest pain or back pain or
17 any of that preexisted -- she's got pericarditis and chest
18 pain. If they are not going to try to say that she had chest
19 pain before.

20 THE COURT: Seems this paragraph is here because of
21 in law school what we called the eggshell plaintiff. If
22 somebody is particularly susceptible to harm because of a
23 preexisting condition, the defendant still is responsible for
24 that harm even if it was due to their susceptibility.

25 So I will think about this issue in light of the

1 evidence that has come in. I understand both parties'
2 position.

05:36:26

3 All right. Ms. Lourie?

4 MS. LOURIE: Punitive damages, Phase I, page 26. The
5 third paragraph down, that's from a pattern charge and at the
6 end of that paragraph, the pattern charge says: Proof by clear
7 and convincing evidence requires a level of proof greater than
8 a preponderance of the evidence but less than beyond a
9 reasonable doubt.

05:36:39

10 THE COURT: And I took that out because the jury will
11 have heard nothing about beyond a reasonable doubt.

05:36:59

12 MS. LOURIE: Well, we all watch television and they
13 hear it all the time. We don't want them to think that that
14 means beyond a reasonable doubt and that is a part of the jury
15 pattern charge from Georgia.

05:37:16

16 THE COURT: Okay. Is that the primary concern, was
17 dropping that?

18 MS. LOURIE: Yes, sir.

19 THE COURT: Okay.

20 Defendant.

05:37:23

21 MR. NORTH: Nothing on that particular charge, Your
22 Honor. I do on the next page.

23 THE COURT: Okay. Before we go there, I will look at
24 that issue.

25 Did you have more on punitive damages?

05:37:34

1 MS. LOURIE: Not that charge. 05:37:38

2 THE COURT: Okay.

3 Defendant, did you on punitives?

4 MR. NORTH: On page 27, Your Honor, we do believe the
5 evidence will support instruction number ten at the end of the 05:37:45
6 trial so we are going to be pressing for that.

7 THE COURT: Okay. I will keep that in mind as
8 something we'll need to decide when the evidence is in.

9 MS. LOURIE: I'm sorry. I didn't know you had moved
10 on to that charge. I do have one comment about punitive 05:38:01
11 damages phase two, that charge. The Court has included the
12 factors to consider and one of those words in the factors is
13 "reprehensibility" and we would ask the Court to give the
14 Georgia pattern charge that defines reprehensibility. It's
15 charge 66.760. Otherwise, the jury will not know how to gauge 05:38:23
16 that word and what reprehensibility means or what factors can
17 be considered.

18 THE COURT: Was that proposed?

19 MS. LOURIE: Yes, sir. It's plaintiff's request to
20 charge number 17. 05:38:41

21 THE COURT: Okay. Hold on just a sec.

22 I'll tell you why I took that out. The reason I
23 didn't include that was, seemed to me those three factors were
24 duplicative of what we've already listed on page 27, not in the
25 same words but it covered essentially much of the same ground 05:39:19

1 and I thought it might be confusing to the jury if we're doing
2 something that's overlapping.

3 MS. LOURIE: Well, the one factor that is not stated
4 earlier, and I think it's important here, is that the jury can
5 give consideration to the harm being caused was physical as
6 opposed to economic. I think that's a huge factor in this
7 case.

8 The second one, actually the conduct, showed a
9 difference to or reckless disregard of the health or safety of
10 others.

11 THE COURT: Okay. I understand that point.

12 Do defendants have a comment on that?

13 MR. NORTH: Nothing else on that one, Your Honor.

14 THE COURT: Okay. All right.

15 Okay. Then we get into the general duty things. Are
16 there other instruction issues that either side wants me to
17 think about?

18 MS. LOURIE: Your Honor, we would like to reiterate
19 that we do want limiting instruction on FDA and we request that
20 the Court give the limiting instruction on mitigation of
21 damages that we discussed.

22 THE COURT: You need to propose something if you
23 would, please. I'll be happy to look at language but I would
24 like you to propose it.

25 Okay. I will -- I think the FDA instruction decision

1 is going to need to wait until the end of the case when I've
2 heard the evidence.

05:41:08

3 Are there other instruction matters?

4 MR. NORTH: Depending on how the FDA evidence goes,
5 Your Honor, we might want to try our hand at doing an
6 alternative charge on the absence of regulatory action that is
7 less a comment on the evidence as concerned the Court with the
8 original submissions.

05:41:16

9 THE COURT: Okay. I'll be happy to consider that.

10 Before we break in the last minute here, were there
11 any major concerns about the verdict form, the way we argued
12 it? Obviously, we're going to simplify it by referring to one
13 defendant rather than two. You'll see it was more detailed
14 than plaintiff, less detailed than defendants. I don't believe
15 in asking a series of interrogatories that lead the jury
16 through their thinking. I don't think that's necessary if they
17 are carefully instructed.

05:41:32

05:41:54

18 So that's why I didn't go with the defendants, but I
19 think we need the information this calls out which is why I
20 didn't go with the plaintiff's verdict form.

05:42:08

21 MS. LOURIE: I mean, I'm -- not to bring up the whole
22 thing again because I know we're going to revisit but the
23 intervening cause section.

24 THE COURT: Right. I agree we'll need to revisit it.

25 MS. LOURIE: Right. And then the only other thing,

05:42:23

1 we had a concern about the apportionment of fault, just the way 05:42:24
2 number one is worded does not incorporate a finding of fault as
3 to Dr. Amer. It says "caused or contributed to" but we feel
4 like it should be worded stronger than that to incorporate the
5 concept of fault. 05:42:47

6 THE COURT: Okay. I'll think about that.

7 MR. NORTH: Your Honor, the only thing we thought is
8 on the punitive damages question, number E, that it should
9 include the clear and convincing evidence phrase. We think
10 that's a vital protection under Georgia law and should be 05:43:00
11 included there to make certain that the jury realizes it's a
12 different burden.

13 MS. LOURIE: Well, if we're going to do that, then we
14 have to add the burden in the apportionment of fault. We have
15 to -- I mean . . . 05:43:14

16 THE COURT: Yeah. I mean, if we're going to do that,
17 we should add preponderance throughout and clear and convincing
18 there.

19 I assume you agree with that, Mr. North?

20 MR. NORTH: Yes. 05:43:27

21 THE COURT: Okay. We will take a look at that.

22 Okay. Traci, what's it like in the afternoons?

23 COURTROOM DEPUTY: We have 4:30s every day except
24 Thursday.

25 THE COURT: Okay. I've got hearings every afternoon 05:43:38

1 next week starting at 4:30 and I have one tomorrow, too, so we
2 can't. But what I will do is talk to Nancy in the morning and
3 I'm going to move one of those hearings on probably Tuesday so
4 that we clear out time to come back to this jury instruction
5 issue.

05:43:41

05:44:00

6 And before then I will get your advice in light of
7 the stuff we talked about.

8 All right. Anything else before we break?

9 MR. NORTH: Nothing, Your Honor.

10 THE COURT: Okay. We all owe Elaine and Traci a
11 bouquet, so keep that in mind.

05:44:10

12 (Whereupon, these proceedings recessed at 5:44 p.m.)

13 * * * * *

C E R T I F I C A T E

I, ELAINE M. CROPPER, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute
a full, true, and accurate transcript of all of that portion of
the proceedings contained herein, had in the above-entitled
cause on the date specified therein, and that said transcript
was prepared under my direction and control, and to the best of
my ability.

DATED at Phoenix, Arizona, this 23rd day of March,
2018.

s/Elaine M. Cropper

Elaine M. Cropper, RDR, CRR, CCP

United States District Court